

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 369

PANAMA RAILROAD COMPANY, PLAINTIFF IN ERROR,

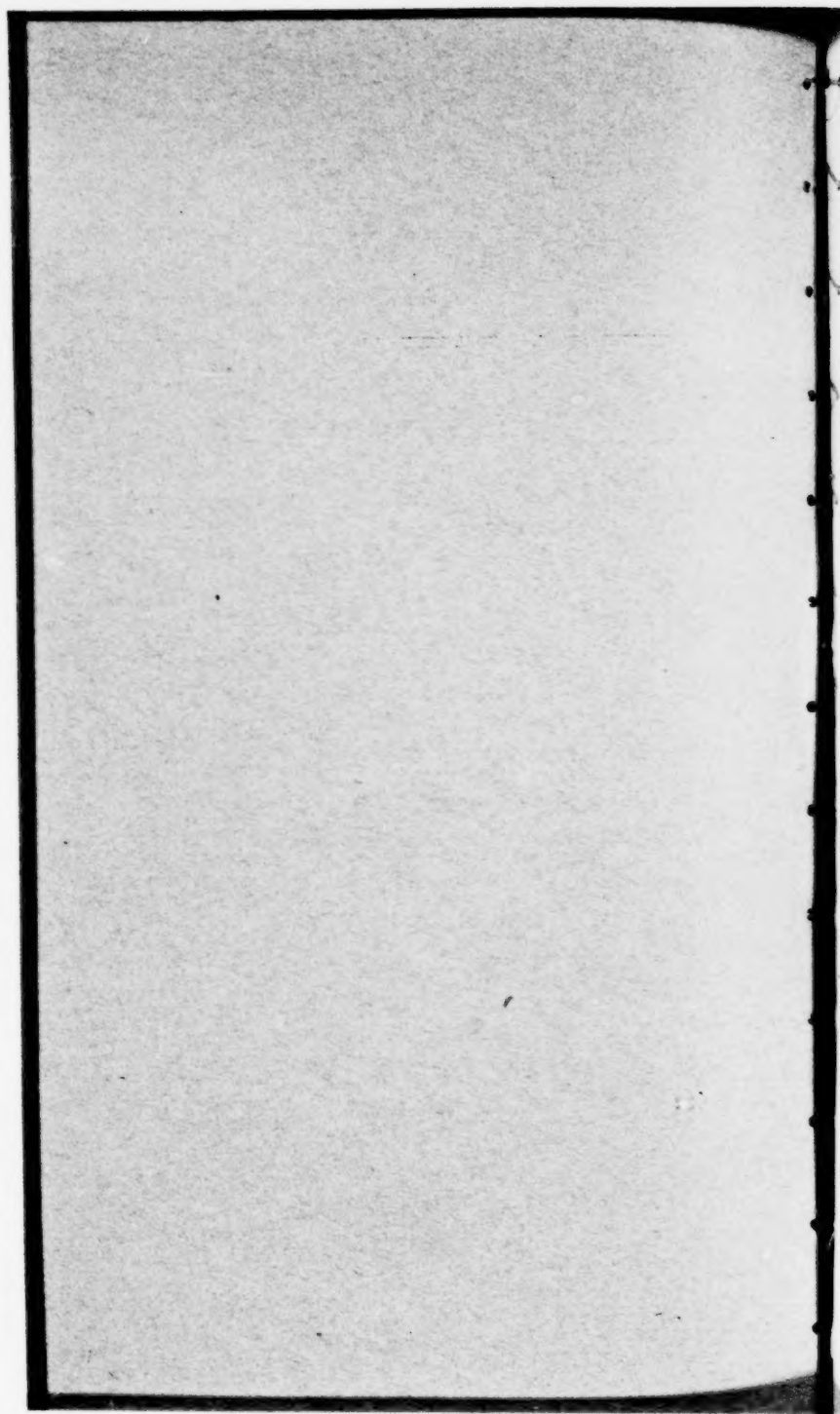
vs.

ANDREW JOHNSON

**IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

FILED JUNE 13, 1923

(29,679)



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SUPREME COURT OF THE UNITED STATES

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vs.

ANDREW JOHNSON

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FOR THE SECOND CIRCUIT

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WRIT OF ERROR—Filed May 31, 1923

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between Panama Rail Road Company, plaintiff-in-error, and Andrew Johnson, defendant-in-error, a manifest error hath happened, to the great damage of the said plaintiff-in-error as by their complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and accordingly to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, this 28th day of May, 1923, and in the One Hundred and Forty Seventh year of the independence of the United States of America.

Wm. Parkin, Clerk. (Seal of United States Circuit Court of Appeals.)

Allowed: Henry Wade Rogers, U. S. C. S.

[File endorsement omitted.]



Writ of Error.

**United States Circuit Court of
Appeals**

FOR THE SECOND CIRCUIT.

L-1294

THE UNITED STATES OF AMERICA, }
SECOND JUDICIAL CIRCUIT, } ss. :

.2

THE PRESIDENT OF THE UNITED STATES, to the Hon-
orable Judge of the District Court of the
United States for the Eastern District of New
York, GREETING :

Because in the record and proceedings, as also
in the rendition of the judgment, of a plea which
is in the said District Court, before you, or some
of you, between Andrew Johnson, Plaintiff, and
Panama Rail Road Company, defendant, a mani-
fest error hath happened, to the great damage of
the said Panama Rail Road Company, defendant,
as by his complaint appears, we being willing that
error, if any hath been, should be duly corrected, 3
and full and speedy justice done to the parties
aforesaid in this behalf, do command you, if judg-
ment be therein given, that then under your seal,
distinctly and openly, you send the record and pro-
ceedings aforesaid, with all things concerning the
same, to the United States circuit court of ap-
peals for the second circuit, together with this writ,
so that you have the same at New York City, in
said circuit, on the 18th day of March next, in the

Writ of Error.

said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this 17th day of February, A. D., 1922, and in the One Hundred and Forty Sixth year of the independence of the United States of America.

PERCY G. B. GILKES,
Clerk.

By J. G. COCHRAN,
Deputy Clerk.

Allowed by

THOMAS I. CHATFIELD,
U. S. District Judge.

(Seal)

Order Allowing Writ of Error.

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UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

ANDREW JOHNSON,
Plaintiff,

against

PANAMA RAIL ROAD COMPANY,
Defendant.

L-1294.

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This 17th day of February, 1922, came the defendant, PANAMA RAIL ROAD COMPANY, by its attorney, Richard Reid Rogers, and filed herein and presented to the court his petition praying for the allowance of a writ of error, and assignment of errors intended to be urged by him, praying, also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the second judicial circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the writ of error upon the defendant giving bond according to law, in the sum of \$10,500, which shall operate as a supersedeas bond.

9

THOMAS I. CHATFIELD.

U. S. D. J.

10

Summons.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

ANDREW JOHNSON,
Plaintiff,

against

PANAMA RAILROAD COMPANY,
Defendant.

L. 1294.

To the above-named Defendant:

11

You are hereby summoned to answer the complaint in this action, and file your answer and serve a copy thereof on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

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WITNESS, the Honorable THOMAS L. CHATFIELD and EDWIN L. GARVIN, Judges of the District Court of the United States for the Eastern District of New York, at the Borough of Brooklyn, this 29th day of July, in the year one thousand nine hundred and twenty-one.

PERCY G. B. GILKES,
Clerk.

By J. A. COCHRAN,
Deputy Clerk.

SILAS B. AXTELL,
Plaintiff's Attorney,
Office and Post Office Address,
9 State Street,
Borough of Manhattan,
New York City, N. Y.

Amended Complaint.

13

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

ANDREW JOHNSON,
Plaintiff,

against

PANAMA RAILROAD COMPANY,
Defendant.

14

Plaintiff, for his amended complaint, alleges:

FIRST: Plaintiff is a resident of the Borough of Brooklyn, City and State of New York.

SECOND: Upon information and belief, defendant is a domestic corporation having its principal office and place of business in the Borough of Manhattan, City and State of New York, and upon information and belief, owned, operated managed and controlled a merchant vessel known as the SS. Allianca.

THIRD: That on or about the 8th of October, 1920, plaintiff was employed on the aforementioned SS. Allianca as quartermaster. That while so employed and while engaged in the performance of his duties, and while climbing up a ladder from the deck to the bridge, he was precipitated to the deck below, whereby he sustained severe, serious and permanent injuries.

15

FOURTH: Whereby plaintiff became sick, sore, lamed and disabled: has been and will be confined

Amended Complaint.

to his home; has suffered and still suffers great pain; has lost and will have to lose large sums of money which he otherwise would have earned; has paid out and will have to pay out large sums of money for medical and surgical attendance, for medicines and for his maintenance and cure.

FIFTH: That said injuries were due to the negligence of the defendant and by reason of the unseaworthiness of the said steamship in that a defective and improper canvas was maintained and kept across the front of the bridge on the top of the aforesaid ladder over the wooden structure to which the said ladder was secured, and by reason of the fact that said ladder was short, and by reason of the fact that the defendant, its agents, officers and seamen in command failed to provide the plaintiff with proper and adequate means of access to the bridge, a reasonable and safe method of going from the foreward well deck to the bridge in the performance of his duties, and by preventing his use of the companionway and by reason of the fact that the ship was improperly constructed in that the aforesaid ladder which was dangerously narrow was provided for the use of men who were required to climb to the bridge with heavy lead lines and lead over their shoulders.

FOR A SECOND CAUSE OF ACTION PLAINTIFF RE-ALLEGES ALL THE FACTS HERETOFORE SET FORTH AND IN ADDITION THERETO ALLEGES:

SIXTH: That defendant failed to furnish plaintiff with prompt, proper and competent medical and surgical attendance although the same was requested and the plaintiff was in urgent need of

Amended Complaint.

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said medical and surgical attendance. That defendant failed to place plaintiff in a hospital in any of the ports at which or near which the SS. *Allianca* touched, thereby greatly aggravating his injuries, causing him greater pain and suffering and, upon information and belief, rendering them permanent and causing the total disability of the plaintiff.

SEVENTH: There is now in full force and effect Section 20 of the Seaman's Act as amended by Section 33 of the Merchant Marine Act of June 5, 1920.

20

EIGHTH: That by reason of the foregoing premises, plaintiff has been damaged in the sum of \$75,000 for which sum plaintiff demands judgment with costs.

SILAS B. AXTELL,

Attorney for Plaintiff,

Office and P. O. Address,

9 State Street,

New York City.

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Amended Complaint.

STATE OF NEW YORK, }
 CITY AND COUNTY OF NEW YORK, } ss. :

ANDREW JOHNSON, being duly sworn, deposes and says; that he is the plaintiff in the within action; that he has read the foregoing amended complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

ANDREW JOHNSON.

Sworn to before me, this
 25th day of November, 1921.

ANNA KIEFER,
 (Seal) Notary Public,
 Kings County No. 381.
 Cert. filed in New York County No. 261.

Answer to Amended Complaint.

25

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

ANDREW JOHNSON,
Plaintiff,

against

PANAMA RAIL ROAD COMPANY,
Defendant.

26

The defendant, PANAMA RAIL ROAD COMPANY, by Richard Reid Rogers, its attorney, answering the amended complaint herein, on information and belief, alleges as follows:

FIRST: Denies having any knowledge or information sufficient to form a belief, as to the allegation of paragraph of the complaint designated "First."

SECOND: Answering paragraph of the complaint designated "Third," denies having any knowledge or information sufficient to form a belief, as to whether or not the plaintiff on the occasion referred to, received any severe, serious or permanent injury.

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THIRD: Answering paragraph of the complaint designated "Fourth," denies having any knowledge or information sufficient to form a belief, as to the allegations of said paragraph, except that it denies that the plaintiff has paid out, or will have to pay out, any large sum of money for the purposes named in said paragraph.

FOURTH: Denies each and every allegation contained in paragraph of the complaint designated "Fifth."

AND FOR ANSWER TO THE SECOND CAUSE OF ACTION, the defendant repeats the denials set forth in the previous paragraphs of this answer, and in addition thereto:

FIFTH: Denies each and every allegation contained in paragraph of the complaint designated "Sixth."

SIXTH: Denies each and every allegation contained in paragraph of the complaint designated "Eighth."

AND FOR A FIRST AFFIRMATIVE DEFENSE defendant alleges:

SEVENTH: That the plaintiff's injury occurred while he was a seaman on board the defendant's steamer, and his cause of action, if any, was therefore governed by the maritime law of the United States, under which the defendant is not liable for such injuries, unless they arise from a want of reasonable diligence on the part of the defendant to furnish a seaworthy vessel and reasonably safe equipment and appliances; and that the said injuries did not result in whole or in part from any such want of reasonable diligence on the part of the defendant.

Answer to Amended Complaint.

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AND FOR A SECOND AFFIRMATIVE DEFENSE defendant alleges:

EIGHTH: That the injuries complained of resulted if not wholly, at least in part, from the negligence of the plaintiff himself, and that even if he should be held entitled to recover herein (which the defendant denies), the amount of his recovery should be diminished in proportion to such contributory negligence on his part.

WHEREFORE the defendant prays that the amended complaint be dismissed and for its costs and disbursements in this action.

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RICHARD REID ROGERS,
Attorney for
Panama Rail Road Company,
Office & P. O. Address,
#63 Wall Street,
Borough of Manhattan,
New York City.

33

34

Answer to Amended Complaint.

STATE OF NEW YORK, }
 COUNTY OF NEW YORK, } ss.:

EDWARD A. DRAKE, being duly sworn, deposes and says, that he is the Vice President of the Panama Rail Road Company, the defendant herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated upon information and belief, and that as to those matters he believes it to be true; that the sources of his information and the reasons for his belief as to matters not within his own personal knowledge are the records of the Panama Rail Road Company and statements made by its officers and employees having personal knowledge of the matters in question; that the reason why this verification is not made by the defendant herein is that the defendant is a corporation.

35

E. A. DRAKE.

Sworn to before me, this
 14th day of December, 1921.

ANDERSON WOODS,
 (Seal) Notary Public,

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Kings County No. 234.
 Certificate filed in New York County No. 103.
 Commission expires March 30, 1923.

Bill of Particulars.

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UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

ANDREW JOHNSON,
Plaintiff,

against

PANAMA RAIL ROAD COMPANY,
Defendant.

Answering defendant's demand for a bill of particulars herein, plaintiff alleges that the canvas referred to in paragraph "Fifth" of the complaint was too high. Secondly, it was not divided in one or more parts so as to permit it to be opened at a point opposite the said ladder so that persons attempting to get over the rail could do so without adding to the element of personal risk which already existed to a high degree because of the fact that the ladder was too short and there were no adequate hand-holds or grips available. It was further defective in that it completely covered the top of the rail and all other available objects of which a seaman in endeavoring to get over the rail would ordinarily take hold.

38

SILAS B. AXTELL,

Attorney for Plaintiff,

9 State Street,

New York City.

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To:

RICHARD REID ROGERS,
Attorney for Defendant,
63 Wall Street,
New York City.

Judgment.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

ANDREW JOHNSON,
Plaintiff,

against

PANAMA RAILROAD COMPANY,
Defendant.

41

The issues in this action having been duly brought on for trial before the Hon. Joseph W. Woodrough, Judge, and a jury, at a Trial Term of this Court, held on the 9th, 10th, and 11th days of January, 1922, at the Court House, Post Office Building, in the Borough of Brooklyn, City of New York; and the defendant appearing by counsel; and the issues having been duly tried; and a verdict for the plaintiff having been duly rendered on the 11th day of January, 1922, for the sum of \$10,000 and the costs of the said plaintiff having been duly adjusted at \$107.67,

Now, on motion of Silas B. Axtell, attorney for the plaintiff,

42

IT IS ADJUDGED, that the plaintiff, Andrew Johnson, recover of the defendant, Panama Railroad Company, the sum of \$10,000 found by the jury, with \$107 67/100 costs as taxed, amounting in all to \$10,107.67, and that plaintiff have execution therefor.

Judgment, this 18th day of January, 1922.

By the Court.

PERCY G. B. GILKES,
Clerk.

By J. G. COCHRANE,
Deputy Clerk.

BILL OF EXCEPTIONS.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

ANDREW JOHNSON,
Plaintiff,

against

PANAMA RAIL ROAD COMPANY,
Defendant.

44

Before HON. JOSEPH W. WOODBROUGH, Judge, and
a jury.

Statement of Proceedings.

January 9th, 1922, case called, trial ordered.

Appearances: Silas B. Axtell, Esq., for plaintiff; Richard Reid Rogers, Esq., for defendant.

Jury impaneled and sworn.

Plaintiff's counsel addressed the jury.

Defendant's counsel addressed the jury.

45

Testimony on behalf of plaintiff.

The plaintiff rested.

Defendant's counsel moved to dismiss the complaint; motion denied; exception allowed.

Testimony on behalf of defendant, including deposition of Robert Nelson read in evidence.

Defendant rested.

Testimony for plaintiff in rebuttal.

Testimony for defendant in sur-rebuttal.

Defendant's counsel moved to dismiss the complaint; motion denied; exception allowed.

Testimony closed.

Counsel summed up the case.

Court charged the jury.

Jury rendered verdict in favor of the plaintiff, and assessed the damages at \$10,000.

Defendant's counsel moved for a new trial; motion denied, exception allowed.

Court granted defendant a stay of 30 days after entry of judgment, and 60 days to make a case, and extended the term accordingly.

List of Important Papers.

The important papers in this action on record with the Clerk are the summons, the amended complaint, the answer to the amended complaint, and the bill of particulars.

Testimony.

49

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

<p>ANDREW JOHNSON</p> <p>VS.</p> <p>PANAMA RAILROAD COMPANY.</p>	<p>Before:</p> <p>Mr. Justice WOODROUGH, and a Jury.</p>
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Brooklyn, January 9, 1922.

APPEARANCES:

50

SILAS B. AXTELL, Esq., for Plaintiff.

RICHARD REID ROGERS, Esq., for Defendant.

(A jury being impaneled and sworn, counsel for plaintiff opens the case to Court and jury.)

(During the opening by plaintiff a model of a ship is produced.)

Mr. Rogers: Objected to.

The Court: If the model is objected to, it must be removed.

(The model is removed.)

51

TESTIMONY FOR PLAINTIFF.

ANDREW JOHNSON, being duly sworn and examined as a witness in his own behalf, testifies:

By Mr. Artell.

Q. You are the plaintiff in this case? A. Yes, sir.

Q. How old are you? A. Fifty-two.

Q. How long have you been going to sea? A. Thirty-four years.

Q. You were born where? A. In Sweden.

Q. Are you a naturalized citizen of the United States? A. Yes.

Q. When did you get your papers? A. The 11th of June, 1918.

Q. You now make your home in New York? A. Yes.

Q. Do you know the steamer *Allianca*? A. Yes.

Q. Were you employed on her? A. Yes, sir.

Q. In what capacity? A. Quartermaster.

53

Q. What are the duties of a quartermaster? A. He has got to steer the ship and look out for the wheelhouse, the steering gear, and do any other thing that a master or officer on watch tells him to do that is necessary for the ship's work.

Q. When did you join the *Allianca*? A. I joined the *Allianca* the 19th of April, 1919.

Q. When did you get hurt? A. I got hurt the 8th of October, 1920.

Q. What time of day was it? A. It was ten minutes past eight at night.

Q. On watch were you? A. I was on from 4 to 8 o'clock watch.

54

Q. You were just coming off watch? A. I was just coming off watch, but I was not relieved; the quartermaster that was going to relieve me, he went to the wheel and relieved the man at the wheel, and I was taking soundings. I was at the wheel from four to half-past five, and from half-past five I left for my supper, and at ten minutes to six I went up to the wheel again.

Q. What officer was in charge of the bridge? A. The chief officer was in charge at that time.

Q. And throughout that watch he was on watch all the time? A. No, sir, he got relieved at a quarter to eight.

Q. What officer came on at a quarter to eight?

A. The third officer.

Q. Was he on the bridge when you got hurt? A. Yes.

Q. Was the master on the bridge, do you know?

A. I didn't see the master on the bridge at the time.

Q. On the four to eight watch you go on duty twice a day. Is that right? A. Yes.

Q. From four in the morning till eight in the morning, and from four in the afternoon till eight in the evening? A. Yes.

Q. And the rest of the time you are resting, asleep, or having recreation? A. Yes.

56

Q. That is the regular rule on all American vessels? A. Yes, it was the regular rule at that time when there were three watches.

Q. And you say you had been working the lead? A. I had been working the lead and taking soundings.

Q. Who told you to do that? A. The first officer told me to go down and heave the lead, and he would send a man to relieve me at the wheel. I was at the wheel when I got the order, and then I went down to the saloon deck and started to work there, and it was very shallow water, and the pilot had left us, and the captain was going out without a pilot, and she was digging into it.

57

Q. Where is the saloon deck? A. The saloon deck is the next deck below the bridge.

Q. You mean the forward well deck? A. There is no well deck.

Q. Right underneath the bridge? A. Right underneath the bridge, yes.

Q. How long were you engaged in that operation? A. A year and five months.

Q. No, no; in taking the soundings on this particular occasion how long were you? A. On this particular occasion taking the soundings I was about an hour and three-quarters or two hours.

Q. How do you take a sounding? A. You stand up against the rail like this (illustrating) and swing the lead; you swing it as far forward as you can when the ship has got speedway on. You get a sounding up and down, and it is marked on a line, and when she marks up and down there is a mark on the line, and you sing out to the officer on the bridge what it is.

Q. Do you recall what your soundings were? A. Yes, sir. The last sounding I had was ten fathoms, and the officer told me to put the lead away and go below.

Q. That would be about sixty feet? A. Yes; I had nine fathoms, and he said, "Take one more sounding and put your lead away."

Q. You were there for an hour and three-quarters or two hours? A. Probably two hours; I couldn't say exactly.

Q. What time did you quit that particular occupation? A. That was about ten minutes past eight.

Q. What was the weight of that sounding lead? A. Oh, I couldn't say exactly; fourteen pounds, I should think.

Q. How much line did you have to it? A. Thirty fathoms of line.

Q. How thick was the line? A. It was about three-quarters of an inch thick.

Q. What was the weather like? A. The weather was kind of dampy weather that night; it was very dark and a little heavy sea running outside when we came outside.

Q. Where was the ship at that time? A. She was going out of the Guayaquil River, getting outside in the ocean, when I was told—when we got in the deep water I was told to put the lead away.

Q. Was the ship rolling some? A. Yes, the seas were swashing up pretty high then.

Q. Was there any spray coming overboard? A. No, there was no heavy spray coming over.

Q. How much sea was there? A. Oh, there was about—well, there was a strong breeze, a strong wind. There was no heavy storm, but there was a strong wind.

Q. You have been in hurricanes, have you? A. Yes, sir.

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Q. How did you get hurt? A. I got hurt—I was ordered up on a ladder going up to the bridge, carrying the lead line with the lead on my shoulder, crawling up; when I came up to the top of the ladder there was a ladder cloth right across the bridge there tied up with small stops for me to crawl over that ladder cloth. I had my hand on the ladder cloth on the top, and the other hand on the ladder cloth, and I couldn't see whether the stops broke, but I know it gave way.

Q. What happened? A. I fell down on the deck with that heavy lead line on my shoulder, and came down on the side, and the ladder came on my hip, and I couldn't move. I was out of my senses for a couple of minutes.

63

Q. You mean you were out of your head? A. Yes, and then hollered for help, and the third officer came down, and he sent for the ship's doctor, and the ship's doctor came. I was laying there for a few minutes, and he sent out for a couple of men to carry me down to my quarters and put me to bed. I laid there till we got to Cristobal, seven days. In that time we were in four different ports

where he had a chance to take me off and put me at the hospital, and he sent me back to the port that we left the day before, to the hospital there.

Q. What was that port? A. That was Manta—

Q. Give the ports after the accident. A. There was Manta, Esmeralda, Buena Ventura, Balboa, and Cristobal was the last port.

Q. When they got to Cristobal they sent you back? A. They sent me back to Balboa to the hospital there. We landed there the day before. He was going to take me off there, but the doctor told me the water was too low, and they couldn't get me to the gangway, but they landed passengers there and got the passengers out through the gangway, and they carried me through the canal, and we got to Cristobal the same night, and they kept me on board that night till the next day at 10 o'clock in the forenoon, when he sent me up to the hospital in Cristobal, but there was no X-ray in that hospital, so they sent me back to Balboa to the same hospital that we passed by the day before.

Q. Was there a doctor on the ship? A. Yes, there was a doctor on the ship.

Q. Did he attend to you? A. He gave me a hot water bag, and he said he didn't know what was broken, and he couldn't do nothing before he had an X-ray taken.

65 Q. Did you ask him to do anything for you? A. I asked him every place we were if he was going to take me off the ship, and he said, no, that they had no X-rays.

66 Q. And you went back to Balboa? A. Yes; he was going to take me off there, but he came down afterwards and told me that the tide was too low there and he couldn't get me over the gangway, and I said, "You can get passengers out, and I don't see why you can't get me out."

Q. How long was the ship there? A. We were not laying there very long; two or three hours; just landed passengers there.

Q. How long after he came and told you that the water was too low to get you ashore did the vessel sail? A. About an hour after we got in there, or half an hour, probably; I couldn't say exactly.

Q. Did the captain come and see you during this time? A. No, sir, he was never down in the room in the seven days I was laying in the room.

Q. Did the mate come down? A. The mate was in there once.

Q. Did you send for any of them? A. No, sir, I did not. The doctor came in twice a day.

Q. Did he put your leg in a splint? A. No, sir, he did not.

Q. What was the condition of your leg at that time? A. It was all swelled up and black and blue.

Q. Which leg was it? A. The right one.

Q. Where was it swelled up black and blue? A. All the way from the hip down to the knee.

Q. Could you feel any broken bones in there? A. I couldn't move it; I couldn't feel nothing. I had an awful pain. I couldn't turn myself around in bed.

Q. I show you a photograph, and ask you if you can tell me what that is? A. That looks like the ladder I fell down off, on the ship.

Mr. Axtell: Will you concede that this is your photograph?

Mr. Rogers: I don't object to the photograph going in evidence.

Mr. Axtell: These two photographs are offered in evidence.

(They are marked respectively Plaintiff's Exhibits 1 and 2.)

Mr. Axtell: Have you any objection to these drawings being used for the purpose of demonstration?

Mr. Rogers: I do not object to them.

Mr. Axtell: I offer in evidence this drawing made on the scale of, I suppose, half an inch to a foot.

(It is marked Exhibit 3.)

(The photographs are handed to the jury.)

Q. Was there any other way of getting to the bridge excepting the one that you used? A. Yes, there was a way; I could walk through the passengers' quarters.

Q. Why didn't you go that way? A. The steward would not let me into the door there with the lead and line. He said to walk the other way, and I sung out to the officer that the steward would not let me in, and he told me to walk up on that ladder, and I went up that way, and that was the way I fell.

Q. Had you, on previous occasions, attempted to go through the passengers' quarters with your working clothes on? A. Yes, I had tried to, but the steward would not let me in that way.

Q. What clothes were you wearing at that time? A. My working clothes.

Q. What are they? A. They are overalls and shirt and coat.

Q. You didn't have any uniform on? A. I only had a uniform cap; that was all we were wearing.

Q. It was not cold weather? A. It was not cold weather, but—

Q. It was not cold down there in October, was it? A. It was chilly and damp.

Q. You just had on dungarees and a shirt? A. Yes, I had on khaki.

Q. Did you have on a coat? A. No.

Q. On previous occasions had you tried to go through that way? A. Yes.

Q. What had been the regular process by the chief steward?

Objected to as to form.

Objection sustained. Exception.

Q. What did the chief steward tell you on any previous occasion? A. He told me not to walk through there. 74

Mr. Rogers: I object. I would like to have him specify the time and place on previous occasions.

Mr. Axtell: I will do that if I can.

Q. Will you state definitely the time and place and exactly what was said to you by the chief steward or any other officer with regard to going through the passengers' quarters on previous occasions? A. The steward told us not to walk in that way. We complained several times to the officer, and he told us there was a ladder on the fore part of the bridge and except it was very heavy weather to walk in that way; if it was heavy weather, to walk through the passengers' stairway. 75

Q. He conflicted with the chief steward; he told you to disobey the orders of the chief steward?

Objected to.

Objection sustained. Exception.

Q. Do I get you right? The chief steward told you to stay out, and the mate told you to go in?

A. No, not that time; that time when the steward stopped me going through the saloon with the lead line and sang out to the officer on the bridge on watch that the steward would not let me in that way, he said, "Walk up this way, on this ladder."

Q. How about the previous occasions, what did they tell you, these two officers, the mate and the steward? Did they both tell you to go through that way or to stay out, or did one tell you to stay in and the other to stay out, before the accident?

Objected to as already covered.

Objection overruled. Exception.

A. They told me to walk up on the ladder on the fore part of the bridge.

Q. Who told you that? A. The officer on watch.

Q. What did the chief steward tell you on previous occasions? A. He told me not to walk up that way, through the saloon.

Q. How many times had such instructions been given to you during your employment on this ship?

A. Oh, I couldn't say; several times.

Q. How high was that canvas on this ship, across the bridge? You may look at Exhibit 1 to indicate.

A. That canvas was, from the bridge, when raised up, it was about—it was sixteen inches wide, that canvas (illustrating).

Q. You just held your stick a certain distance above the rail— A. About that high (illustrating).

Q. You have indicated at least two feet. A. Well, it was about that high.

Q. You mean that was the entire width of the canvas? A. That was the entire width of the canvas, yes.

Q. Look at the photograph, Exhibit 1. Where was the canvas secured to the front of the bridge?

A. Just on the fore part.

Q. Look at the photograph. Do you understand the photograph? A. Yes, it was secured—a loose part underneath, and tied up.

Q. It was underneath the top of the rail? A. Yes.

Q. It was not secured to the top of the rail itself? A. The lower part of the canvas was.

Q. What is this strip along this picture which appears to be on the top of the ladder? A. That was the place where it was fast to.

Q. What is that made of, that it is secured to? A. It is made of a piece of wood.

Q. How wide and how thick? A. It is not very thick, but about an inch thick with holes here and there.

Q. Is it possible to grab hold of it with your hand, to grab around it? A. No, you couldn't get hold of that with your hand.

Q. Is it possible even when there is no canvas secured to it? A. No.

Q. Was it possible for you to grab the top of the rail of the bridge? A. No.

Q. What did you get hold of? A. I got hold of that canvas.

Q. Where was the third officer at the time? A. It was dark, and I didn't see him up there. He was on the other side of the bridge.

Q. The officers on watch walk back and forth across the bridge like this (illustrating)? A. Yes.

Q. Was this the portion of the bridge that the officer was doing his walking on (indicating on photograph)? A. Yes.

Q. How recently before you fell had you talked to him or seen him? A. About a minute before.

Q. Could you see him? A. I saw a man over on the starboard side in the corner of the bridge.

Q. Is there any light in front of the bridge?

A. No, sir.

Q. What lights are there on the ship at night? What lights are permitted on the ship at night?

A. There are running lights.

Q. What are the running lights? A. They are the lights on the ship anywhere that don't blind the officers from the navigation, from looking forward.

Q. We are not sailors, so tell us what the running lights were on the *Allianca* that night? A. We had a masthead light on the foremast.

Q. Where is the foremast? A. The foremast is forward of the bridge.

Q. In the middle of the well deck? A. Yes, in the fore part of the ship.

Q. About half way between the bridge and your bow? A. No, it was closer to the bridge than to the bow.

Q. How high up the mast is the light? A. The light is up about seventy-five feet.

Q. Does it throw any light on the deck? A. No, sir. That threw no light on the deck.

Q. What kind of a light is it? A. It is a light that shows light right ahead, right across the beam, half a point across the beam.

Q. If you are abeam of her and a bit forward, you can see that? A. Yes.

Q. But you can't see it from aft? A. No, you can't see it from aft.

Q. You had a red running light on your port and a green one on your starboard? A. Yes.

Q. Do they give any light on the bridge? A. No, sir.

Q. They are arranged so that they can only be seen from in front or abeam? A. Yes.

Q. Back aft you have another light or two? A. We have a stern light astern.

Q. That is the regular rig of a steamer at sea? A. Yes.

Q. How big was the *Alliance*? A. She was about 3500 tons.

Q. About how long is that?

By the Court.

Q. Give us your judgment as to the length of it; about how long was it? A. About 400 feet, I should think. 86

By Mr. Artell.

Q. How wide is she, her beam? A. About sixty feet or fifty feet.

Q. Looking at this court room, was she as wide as the court room? A. No, she was not as wide as the court room.

Q. Say this is the port rail, this wall of the court room, and I will walk this way (illustrating) till I get to the starboard, and you tell me when to stop. A. About right where you are now.

Q. You think that was about her width? A. Yes.

Mr. Artell: That is about forty-two feet. 87

Q. After you got into the hospital, what did they do with you? A. After I got to the hospital they put me to bed.

Q. I forgot something. After Balboa, where you wanted to be taken to the hospital, you went to Cristobal? A. Yes.

Q. How long did that take? A. It took eight hours.

Q. How long was the ship there? A. Till the next morning at 10 o'clock, when I was taken off to the hospital.

Q. Did they take the ship back again? A. No, they sent me back by rail.

Q. By railroad train? A. Yes.

Q. By what railroad? A. The Panama Railroad.

Q. The same as the ship? A. Yes.

Q. What time did you get to the hospital? A. Two o'clock in the afternoon.

Q. From the time of the accident up to the time you got to the hospital, what feelings did you have in your right leg? A. I had a very pain and I couldn't move it at all.

Q. You had a "very pain"? A. Yes, I had very much pain in my leg and I couldn't move it either one way or the other.

Q. Were you in a comfortable bunk? A. Well, it was not so very comfortable because I couldn't get out or in there nowhere.

Q. Whose bunk was it? A. It belonged to the other quartermaster, because I had the top bunk.

Q. What was the matter with the hospital bunk on the ship? Why didn't they put you in the hospital on the ship? Didn't they have one? A. Yes, they had a couple of hospital rooms.

Q. Did they leave you in your own quarters in your own bunk, or in the other quartermaster's bunk? A. Yes, his bunk was underneath mine and they couldn't lift me up in my bunk, so they left me in his bunk.

Q. How wide was your bunk? A. About three feet.

Q. What is it made of? A. An iron spring and a mattress.

Q. How big was your room? A. It wasn't very big; there were three men in there; three firemen.

Q. How big was it? How much bigger than that box (indicating the witness box)? A. It was just enough for the three of us to sit in there.

Q. How much room was there besides that occupied by your bunks? A. There was a little space about twice as big as this platform.

Q. That platform is about three feet wide and four and one-quarter or four and one-half feet long. Was it about twice as big as that? A. Yes.

Q. Were these bunks two high or three high? A. They were two high and then one high.

Q. One across the end? A. Yes.

Q. Were there any windows in this room? A. Yes, there were two windows.

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Q. Ports? A. No; regular windows.

Q. Up on deck, were they? A. No; out to the main deck.

Q. What time did you arrive at the hospital? A. About 2 o'clock in the afternoon.

Q. What day of the week or the month was that, do you recall? A. It was the 15th of October, 1920.

Q. You were injured on the 8th? A. Yes.

Q. Did they operate on you that day? A. No, they didn't operate on me.

Q. What did they do? A. They sent me up for an X-ray.

Q. What time did they make the X-ray? A. The day after I came into the hospital I went up for an X-ray in the morning, about 11 o'clock.

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Q. Then they made the X-ray, and did they do anything to make you comfortable? A. No, sir.

Q. What did they do after they made the X-ray? A. They put me to bed.

Q. Did you see the X-ray plate? A. Yes, I saw the X-ray plate.

Q. Can you describe it? Do you remember how it looked? A. Yes.

Q. How did it look? A. I went up for X-rays three times.

Q. (Repeated) How did it look?

Objected to.

Objection sustained.

A. I asked the doctor if I could——

Objected to.

Objection sustained. Exception.

Q. What did they do after that? A. They put me to bed.

95 Q. Did they set any bones? A. No, sir.

Q. They never did? A. No, sir.

Q. They never operated on you? A. No, sir.

Q. Did they tell you why? A. They told me they couldn't operate on me on account of it was an impacted fracture of the femur.

Q. The bones had grown together by that time?

Objected to.

Objection sustained. Exception.

Q. How do you get along with that leg now? Can you take a job? A. No, I couldn't take no job.

Q. Do you need the cane that you are using?

96 A. I couldn't walk—probably I could walk across this room; that is about all I could walk without the cane now, the only walk I could take—if I could get a watchman's job or anything like that, I could do that; but I could not go to sea.

Q. Have you done any work since the accident?

A. No, sir, I haven't been able to do any work since the accident.

Q. What wages were you getting on this ship?

A. I was getting \$87.50, and \$2.75 a day for my grub.

Q. It was understood that when the ship—

Objected to.

Q. What do you mean by \$2.75 a day for grub?

A. When the ship was laying in port there was no cook on board and we would keep ourselves, and they would give us \$2.75 a day for grub money besides wages.

Mr. Rogers: I move to strike that out as not connected with his monthly pay in any way that I can see.

By the Court.

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Q. Do you mean that whenever you reached port that happened, or that it just happened once? A. Every time we were here in New York when they would not feed us on board it happened.

Objection overruled. Defendant excepts.

By Mr. Artell.

Q. You have not earned any money since the accident? A. No, sir.

Q. Have you been regularly employed before that? A. I was employed in the *Allianca* for a year and five months.

Q. And other ships before that? A. Yes, I was in lots of other ships all the time before that.

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Q. What is your record for seamanship? A. I think I hold a very good record.

Q. Have you ever got any bad discharges from any captain or officer? A. No, sir.

Q. Have you ever been put in jail for mutiny or other offenses?

Objected to.

Objection overruled. Exception.

100

Andrew Johnson—Plaintiff—Direct—Cross.

Q. What education have you had? How much schooling have you had? A. I was going to school from I was six years old till I was fifteen.

Q. That was in the old country? A. Yes.

Q. Do you read and write English? A. Yes.

Q. Are you skilled in bookkeeping or any other of those arts or sciences or professional or clerical or office work? A. No, sir, I never did anything like that, only I mark down once in a while in the logbook wind and weather, etc., when I am on the ship.

101 Q. That is about the extent of your clerical training. Is that right? A. That is all.

Cross-examination by Mr. Rogers.

Q. I understand that you were on the *Allianca* for a period of seventeen months; is that right? A. Yes, that is right.

Q. Did you serve upon the vessel in the capacity of quartermaster during the whole of those seventeen months? A. Yes, sir.

Q. How many voyages to and from South America has the *Allianca* made during the seventeen months, approximately? A. I couldn't say that just now.

102 Q. About how long would it take you to make the round trip? A. I might say about a month a trip.

Q. About a month to make the round trip? A. Yes; sometimes we took a month and a half; that was the longest.

Q. You probably made as many as fifteen round trips during this period of seventeen months? A. Yes.

Q. On all these trips were you expected to make soundings from time to time? A. No, sir, we never

were any place where we needed to take soundings before we went to the Guayaquil. We had never been there before.

Q. Do you mean to say that that was the first time you had ever taken a sounding since you had been on the ship? A. No, on lots of other ships.

Q. Was it the first time you had ever taken a sounding while on the *Allianca*? A. Yes; so far as I could recollect, except alongside of the dock here in New York I was taking soundings a couple of times in the boat to see how deep water there was there.

Q. Well, at the particular time when you were injured, when you took this sounding was the first time, except when you took it alongside here in New York, that you have ever been ordered to take soundings upon the *Allianca*? A. No, lots of other times we took them with the machine.

Q. What did you take soundings with? A. We had a machine aft with a wire and we took soundings when it was not very deep water.

Q. That was when you were at sea? A. Yes, when we were at sea.

Q. I am trying to find out how many times during that seventeen months you had taken soundings with a lead and line? A. Well, I think this was the first time.

Q. The first time? A. Yes.

Q. Had you ever been up the Guayaquil River with this boat before? A. No, that was the first time.

Q. This was the first voyage on the Guayaquil River? A. Yes.

Q. On the other trips you had run to the Isthmus and back to New York? A. To the Isthmus and Cartagena and Haiti and Columbia and back to New York.

Q. You took no soundings at any of these points with the lead, forward? A. No, sir.

Q. As you went up the Guayaquil River did you take any soundings? A. Going up the Guayaquil River I took soundings.

Q. How did you take them? Did you take them with the lead? A. The same way.

Q. You took them? A. Yes, sir.

Q. You were coming down the Guayaquil River at the time you were hurt, were you not? A. Yes.

Q. Would you have taken soundings going up the river? A. Yes, going up the river.

107 Q. Then it was not exactly correct to say that the time you were hurt was the first time that you had taken soundings with the lead and line? A. No; the same trip going up the river I took soundings too.

Q. How many times did you take soundings going up the river? A. As fast as we could heave the lead; about every two or three minutes.

Q. All the way up the river? A. All the way up the river. As fast as I could heave it and pull it up and heave it again and sing out to the bridge.

108 Q. That refers to the interval between the time of dropping the lead and taking it up and dropping it again. How many times had you gotten the lead out from the box where it was to take the soundings? How many separate times have you taken soundings? A. I don't understand that.

Q. On how many different watches have you taken soundings? A. Only on one watch; I was always on the same watch from four to eight.

Q. You don't seem to quite understand yet. As I understand it, you went up the Guayaquil River and you took the soundings going up? A. Yes.

Q. Did you do it on more than one occasion? A. No; I went up—going up, I went up there

about two hours and going out I was taking soundings at that time.

Q. Then, coming down you took soundings for about two hours and going up for two hours, and then those were the only soundings with line and lead that you recall taking on the *Alliance*? A. Yes.

Q. And you have referred in your testimony to the fact that the officer had told you, when having a lead and line, to go through the cabin and come up the companionway. When and where were these instructions given to you by that officer? A. When I was finished taking the soundings.

Q. On what occasion did he tell you that? A. Because I was stopped from going in the other way.

Q. When was that? You said in your testimony in answer to Mr. Axell that the officer had told you that you could use under certain circumstances the companionway. When was it that the officer told you that? A. I sung out to the officer.

Q. You don't understand me. Perhaps you have forgotten what you testified to. I am trying to find out when it was that some officer of the ship authorized you to use the companionway; not at the time of the accident, but before the time of the accident. When did that happen? A. The same night. The steward told me not to go in there with that line, in through the passengers' quarters.

Q. But before that you stated in response to a question put to you by your own counsel, Mr. Axell, that the officer had told you that you could use the companionway. When did he tell you that you could use it? A. Several times before we complained to the officer about the steward. We had another steward before, and he would not let us go up, and we complained and the officer told us that in very heavy weather when she took the seas over,

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111

we could use that companionway and go up that way; but in fine weather we were to use the ladder on the bridge and walk up and down that way.

Q. When was that conversation? A. That was before; several times before.

Q. Was it at times when you had been sounding? A. No, not when we had been sounding; some other occasion, because there were a couple of men fell down on that same ladder and made some kind of complaint, but they didn't hurt themselves very much.

Q. Was this at the beginning of the voyage that the officer made the statement to you? A. Oh, several voyages before that.

Q. Have you ever, as a matter of fact, used the companionway at any time? A. Yes.

Q. When was that? A. Several times when it was bad weather and we walked up that way.

Q. You had gone up that way? A. Yes.

Q. On a ship isn't the mate or the first officer's authority superior to that of a steward, if there is a conflict between what the steward says to do and what the chief officer tells you to do? Whom do you obey under those circumstances? A. When the steward tells me not to do anything, I complain to the first officer.

Q. Who was the superior in authority; the steward or the first officer?

Mr. Axtell: Objected to as a question of law; not a question of fact; it calls for expert testimony and I do not think this man can answer that question.

Q. Well, I will ask you this question: Who has the superior authority on any ship? Has the mate of the vessel or the steward?

Mr. Axtell: If you know.

A. In our department the mate has, in the deck department. In the steward's department the steward orders his men.

Q. Well, the steward is concerned with preparing food for the passengers, and such things? A. Yes.

Q. That is his business on the ship, isn't it? A. Yes, the passengers and his own men.

Q. If the mate gives the steward an order, the steward is expected to follow it out? ?

Objected to.

Q. If the mate gives the steward an order, is not the steward expected to follow the mate's order? 116

A. He is if he gets orders from the master to do it.

Mr. Axtell: I do not want this witness to testify to things that the Steamboat Inspectors cannot answer.

Mr. Rogers: Other people can answer that.

Q. You said something about the weather when this occurred. Was the ship rolling very much?

A. Well, it was digging into it pretty good when we got outside.

Q. Were you outside of the Guayaquil River? A. We were outside of the Guayaquil River.

Q. Were you in the swell of the ocean? A. Yes; when you come out of the river it is more swell than when in the ocean, because there is more choppy sea there. 117

Q. Can you give us any idea of how severely the ship was rolling at that time? A. Oh, she was rolling a little bit and diving into it a little.

Q. Was she pitching, too? A. Yes, she was pitching, too.

Q. Did you have any difficulty in keeping your foothold on account of the motion of the vessel as you walked along the deck? A. Yes, we had.

Q. It was hard to walk? A. It was hard to walk if a man was not used to it. Out at sea he would not—

Q. But you had been to sea thirty-two years. Did you have any trouble? Was the ship rolling so much that you had trouble in standing up on the deck of the ship? A. Not without holding on to anything, except moving along with the ship.

119 Q. You know when a ship is pitching heavily and rolling heavily in heavy weather or when it has nothing more than a slight motion made by the waves. Can't you tell me which of these two motions this ship had? A. She was a small ship and she had a quick motion when she was pitching into the sea. She was not like a big ship. They take a longer motion. A small ship pitches into it quick and it gives you a shake when you are standing on deck.

Q. Was there anything unusual about the motion of the ship? Was it rolling or pitching more than ordinary? A. No; just pitching ordinarily.

Q. What was the force of the wind? A. About fifteen miles an hour.

Q. Should you describe that as a strong wind?

120 A. Yes, it was a very strong wind.

Q. It was more than a stiff breeze? A. Yes.

Q. You are not familiar, or are you familiar, with the Beaufort scale? A. No.

Q. You don't know about that? A. No.

Q. The force of the wind was just this side of a storm. Was that it? A. Yes.

Q. Just a little this side of a storm? A. Do you mean the force? When you put it down in a logbook?

Q. You know there is a certain scale by which they measure the force of the wind. I just want your description of the force of the wind. Was the force of the wind just this side of what it would have been if it had been a storm? A. Just this side of a storm, yes.

Q. You were not out of sight of the land? A. Yes, we were all clear outside of the land.

Q. Could you see the land—were you far enough away from land to be out of sight of land? A. I could see the land; there was a lighthouse there.

Q. What was the name of the land? A. I couldn't say.

Q. How far off shore had you gotten from the land? A. At the time of the accident?

Q. Yes. A. I should think about eight or nine miles.

Q. Was that the last light you would see on land? A. Yes, that was the last light.

Q. What time did you go to get the lead and sounding line? A. At 6 o'clock in the evening.

Q. Where was it? A. It was down below on the deck all ready to heave when I came down.

Q. It had been used by some other quartermaster? A. I don't think so; it was just laying handy there in case we had to use it.

Q. Did you know where the lead was kept? A. Yes.

Q. Where? A. Up in the wheelhouse in the locker up there; they were all there handy any time we wanted it, so that we could get our hands on it.

Q. You didn't go after the lead? A. No, sir, it was down below there all ready to heave, the lead and line.

Q. I am going to ask you to give me a little better description if you can of the grip of your hands

and of your feet as you climbed the ladder before you fell. Take this photograph. Look at this photograph, Exhibit 2; there are seven rounds upon the ladder. Take either your right or your left foot and tell me what round was it, with your right foot on, so far as you can remember, as you were climbing the ladder just before you fell.

Mr. Axtell: Objected to unless he specifies which he means.

A. I was on the top step here (indicating).

Q. You had gotten as far as the top step? A.

125 Yes.

Q. The last round on the ladder? A. The last round on the ladder.

Q. Do you remember which foot you had upon that round? A. The right I had on that round, and the right hand I took hold of the dodger with, the weather cloth, and the left hand. I was just going to lift my leg up over the dodger, and the cloth or something gave way and gave me a jerk and I dropped down, and I had the lead line on this shoulder (indicating) and came down on the side.

Q. As I understand it, you had gotten your right foot upon the last round of the latter? A. Yes.

126 Q. And your left foot you had lifted off the ladder for the purpose of stepping over on to the bridge? A. Yes.

Q. And your right hand had hold of what? A. The weather cloth.

Q. What part of the weather cloth? A. On top of it.

Q. To go back to where we were, on the last round of the ladder, you had your right foot there and you were lifting your left foot over the rail so as to step on to the bridge. You had your right

hand hold of something. Did you say that that was the weather cloth? A. That was the weather cloth, yes.

Q. What part of the weather cloth was it? A. On top, right at the top part of the weather cloth.

Q. So you made no effort to catch hold of the rail of the bridge with either hand? A. I couldn't catch hold of the rail.

Q. Why? A. Because the weather cloth was on the outside of the rail, stretched out.

Q. How high above the rail was the weather cloth? A. About fourteen inches.

Q. Indicate it with your cane. A. About that high (the witness indicates).

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Q. That is a good deal more than fourteen inches. That is nearly two feet; twenty inches anyhow. A. Well, it was about that high.

Q. Shall we call it twenty inches then? A. Yes, twenty inches; but it couldn't be twenty inches, because it was about that high (illustrating).

Q. You are indicating the same distance, about twenty inches? A. Well, about that high.

Q. It was stretched across there? A. Yes.

Q. And you caught hold of the top of the cloth? A. I caught hold of the top of the cloth.

Q. Where was your left hand? A. Oh, it was over the weather cloth.

Q. What was it resting on? A. It was resting on the weather cloth.

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Q. So that you had got to the top of the ladder and your right foot was on this round and you were lifting your left leg to step over and you had held of the weather cloth with your right hand and your left hand was on top of the weather cloth? A. Yes.

Q. You had no grip on anything except the weather cloth? A. No, nothing else.

Q. And you say something gave way? A. Something broke; the stop, I think, or something gave way, and slapped down.

Q. I am not surprised. It must have been the weather cloth that gave way. A. No, I think it was the stop that broke off.

Q. Did you fall as a result of your foot slipping off that round of the ladder? A. No, my foot was not slipping at all.

Q. Did you fall as a result of reaching with one of your feet for the step of the ladder and not finding it? A. No, sir.

131 Q. You fell as a result of your grip upon the canvas giving way. Is that it? A. Yes.

Q. As I understand you, after you came down the Guayaquil River you stopped in at several little ports, Esmeralda, Buena Ventura and Manta. Is that so? A. Yes.

Q. What sort of ports are they? Small or large? A. I have only been in one place before, and that was Buena Ventura, and that was quite large for shipping. The other places I have not been in before, and I was down in my room and not up on deck, and I couldn't see what kind of a place it was.

132 Q. Does the ship go into a dock, alongside of a dock, as it does here in New York, or does it anchor out in the stream and transfer passengers by lighter? A. In Buena Ventura we transfer passengers by the tug.

Q. And in the other ports? A. I don't know; I couldn't see. I was down below at that time.

Q. Well, there are no docking facilities at any of those ports? A. We were not alongside of the dock anyway.

Q. Are you familiar with hospital services at these various places? A. Balboa was the only place where we were alongside of the dock.

Q. Do you know anything about the hospitals at the small equatorial ports? A. No.

Q. You know about the hospital service at Balboa. You know they had a very fine hospital there?

A. Yes; I didn't know it before I got there.

Q. But you have visited the Isthmus of Panama a number of times? A. Yes.

Q. Don't you know that the hospital at Balboa is maintained by the Government of the United States for the care of employees of the Panama Canal and of the railroad? You knew that, didn't you? A. Yes.

Q. It had the reputation of being a good hospital, didn't it? A. Yes.

134

Q. There was none among these little towns down the Guayaquil River that had any reputation for hospital service, was there? A. I don't know anything about that.

Q. Well, I am just trying to find out whether you really, under the circumstances, wanted to be put ashore in a Spanish country at a small seaport town and turned over to the care of such assistance as you could receive there, or whether you preferred to be taken up to Balboa, where the Government of the United States maintained a really first-class hospital? Which did you want?

A. Well, I would have liked to be taken off at any place where they could fix me up.

135

Q. Were you satisfied that you could be fixed up at any of these country ports? A. Well, Buena Ventura was quite a big city, and I should think in a city like that they would have to have a good hospital.

Q. You made a request to be taken ashore at Buena Ventura, did you? A. I asked the doctor every day, "Are you going to take me ashore?" and he said, "No, there is no X-ray here," and he

couldn't do anything before he got an X-ray, he said.

Q. Do you think he was telling you the truth about that?

Objected to.

Q. Were you satisfied with the statement of the doctor upon that point? A. Well, what he could have done was he could have taken me ashore at Balboa instead of keeping me aboard and then sending me back by rail.

137 Q. I am just trying to find out what your criticisms are, whether one is that they didn't put you ashore at one of the small ports where there was no X-ray and probably no hospital service, but instead of that took you up to Balboa? A. Yes.

Q. Are you complaining that they didn't put you ashore at one of these small Spanish towns instead of taking you to Balboa? A. No, they didn't take me ashore at Balboa.

Q. You didn't want to be put ashore at some port in Ecuador, but you were dissatisfied because they didn't put you ashore at Balboa when the ship stopped there the first time? A. Well, I did as the doctor told me; I couldn't do no better. I was sick.

138 Q. Would you really have preferred to have been put ashore in one of these small towns on the shore of Ecuador—

Mr. Axtell: Objected to as to form. The plaintiff has said he wanted to be put ashore in Buena Ventura, and the encyclopedia will show the population there and a hospital in it.

Objection overruled as made.
Exception.

Q. —than to have been taken up to the Isthmus where the Government maintained a complete hospital service? A. Well, if they had had a good hospital there in those places where they could have put me ashore I would have preferred to be put ashore at the first opportunity where there was a good hospital.

Q. You didn't want to go to anything but a first-class hospital, did you?

Mr. Axtell: I object further to the witness answering this question because the question is not as to the feelings or wishes or desire of an ignorant seaman, but whether or not, in the exercise of reasonable care and sound judgment, the master has performed his duty in sending the seaman or not sending him into the hospital.

140

Objection overruled. Exception.

Q. (Repeated) You didn't want to go to anything but a first-class hospital, did you? A. I wanted to go to any hospital where they could make me right. I told the doctor that any hospital where I could get treatment I wanted to go to.

Q. Whether it was X-ray or anything else, you wanted to go there? A. Yes.

Q. Do you know Robert Nelson? A. Yes, sir, I know Robert Nelson.

141

Q. Who was he? A. Robert Nelson was a quartermaster that time when that happened.

Q. Did you have any conversation with him as to the manner in which you received this injury? A. I did not.

Q. Did you tell him how you received it? A. Yes; he was at the wheel at the time it happened.

Q. Did you tell him how you fell? A. No, I didn't tell him how I fell.

Q. Did you describe to him the manner in which you fell from the ladder? A. No.

Q. Didn't he ask you how you fell? A. He never asked me.

Q. You just said that you did talk to him about your accident. A. He was on the ship when it happened to me.

Q. After it occurred did he come to see you? A. Yes. I saw him here in New York.

Q. Did you ever see him on the ship from the time you were hurt until you got off the ship? A. After I got off the ship.

143 Q. When was the first time that you had any talk with this man, Robert Nelson, after the accident? A. After I got to the Marine Hospital in Staten Island last summer I saw him in New York.

Q. That was the only conversation you ever had with him? A. I saw him several times.

Q. Did you talk to him then about your accident? A. Yes, I talked to him then about the accident.

Q. Did you tell him how it occurred? A. No, we were just talking about how it happened, and he asked how I fell. I saw him on South Street, and he stopped at the Seamen's Institute several times.

Q. Did you make any explanation to him as to how the accident happened? A. No.

144 Q. You did not? A. No, sir.

Q. But you never had any conversation with him on the ship? A. No, not on the ship.

Q. Had you been up this ladder before? A. Yes.

Q. In the seventeen months that you worked upon the ship how many times had you been up the ladder? A. I couldn't tell; I was working there several times.

Q. Had you been up the companionway any time during the seventeen months? A. Yes.

Q. This weather cloth that you speak of, what is the purpose of the weather cloth? A. That is to keep the wind off from the officers that are on watch on the bridge.

Q. They put it up only when a strong breeze is blowing, to protect them from the weather, or when there is rain? A. Yes, from the weather, or when there is rain.

Q. Where the weather is clear, and there is no strong wind blowing, what do they do with the weather cloth? They don't use it all the time? A. Yes, it stays there just the same.

Q. Do you mean it is stretched all the time? A. It is stretched all the time from the time we leave port till we get back to New York. Sometimes they let down one of the stops, let it down a little, if the wind is from aft and it is fine weather.

146

Q. Do you mean to say that it is never triced down upon the bridge rail, tied around the bridge rail, when at sea? A. In fine weather they might let one or two stops out and let it down just a few inches, yes.

Q. But it is kept stretched across the bridge all the way from one port to another, the round trip? A. Yes.

Q. Are you sure of that? A. Yes, I am sure of that; sometimes they don't take it in in New York even; they leave it in New York.

147

Q. In climbing up the ladder and getting on to the bridge on these other occasions when you used the ladder, had you been catching hold of this cloth and lifting yourself over the bridge rail by the use of the cloth? A. Well, yes, climbing over the cloth, and when the cloth is left down a little bit you can lift your arm over and put it on the rail inside and lift your leg over that way, but the cloth lifts up underneath your arm.

Q. Well, at that time it was not let down even a little bit? A. Well, I couldn't tell; it was a very dark night, but I don't think it was.

Q. Anyhow, you couldn't reach over and get hold of the rail? A. No, I couldn't reach over and get hold of the rail.

Q. On the occasions when the cloth was stretched across the bridge and not let down, how do you get on to the bridge? A. By holding on to the cloth and putting your feet over.

Q. Generally you can get over that way, by getting on to the cloth and the cloth will hold?

149

A. Yes, the cloth will hold.

Q. Do you mean to say that a proper method of climbing over the rail of the bridge and getting on to the bridge was to catch hold of a weather cloth and support your weight with your hand on the weather cloth? Was that a proper method, to climb over? A. Well, that was the way we had to do it.

Q. Do you consider that good seamanship? A. No, it is not.

Q. To risk your weight upon a weather cloth?

A. No, it is not.

Q. As I understand you, this weather cloth is the same kind of cloth that you had seen on other ships, or was it different? A. No, lots of ships use the same kind of cloth, but I never saw that same kind of a ladder.

150

Q. What is it made out of? A. Heavy canvas.

Q. Brown or white? A. White.

Q. Is it a thin rope reaching from one standard to another on the bridge? A. Yes, a small rope all the way around the weather cloth.

Q. The cloth was the same that they had been using on previous voyages on this vessel? A. Yes.

*Andrew Johnson—Plaintiff—Redirect.
Arthur E. Hoag—For Plaintiff—Direct.*

151

Redirect examination by Mr. Artell.

Q. Do you know why Mr. Rogers calls it cloth instead of canvas?

Mr. Rogers: I can call it canvas just as well.

Q. How heavy was the canvas? A. It was No. 1 canvas.

Q. Was it a heavy or a light canvas? A. Heavy, pretty heavy.

Q. It had a leech, didn't it? That is a loop on the canvas over a rope. A. Yes. 152

Q. And the rope inside, out of sight? A. No, sir, the rope was outside.

Q. How large was that rope? A. About half or three-quarters of an inch thick.

Q. How was the canvas on top of the bridge secured at the front? A. With stops, tied up with stops, rope stops about two feet apart.

Q. No, you misunderstand me. On the top of the bridge there is also a canvas? A. No, at the top of the bridge is no canvas.

ARTHUR E. HOAG, being duly sworn and examined as a witness for the plaintiff, testifies: 153

By Mr. Artell.

Q. You are a physician and surgeon? A. I am.

Q. Admitted to practice in this State? A. Yes.

Q. Where is your office? A. 331 West 101st Street.

Q. What medical school are you a graduate of? A. Cornell.

154

Arthur E. Hoag—For Plaintiff—Direct.

Q. How long have you been practising? A. I graduated in 1908.

Q. Are you connected with any hospitals at present? A. The New York Hospital, the Community Hospital, and I was an instructor in surgery at Cornell for about nine years.

Q. Do you make any specialty? A. Fractures, in surgery.

Q. What experience have you had in handling fractures? A. I had fracture work in Cornell for nine years, and I have been handling it in Bellevue Hospital Dispensary and in the New York Hospital Dispensary and the Community Hospital.

155

Q. Do you handle X-ray work? A. I do.

Q. Have you examined Mr. Johnson, the plaintiff in this case, and made an X-ray? A. I have.

Q. Did you examine him on more than one occasion? A. I did.

Q. Have you the X-ray plates of both examinations? A. I have.

Q. I show you two plates. Which is the first one taken? A. This one (indicating).

Q. Will you step over here between the light and the jury, and explain—

The Court: Let us see how clear those are. Sometimes they are not clear enough to help the jury.

156

(The Court examines the plates.)

Mr. Rogers: I object to that kind of examination. It is impossible to get it on the record in the way counsel suggests.

Q. Is this the negative of the X-ray plate which you made of Johnson? A. That is the negative.

Q. On what date was that made? A. On July 21, 1921.

Q. You made that yourself? A. I did.

Arthur E. Hoag—For Plaintiff—Direct.

157

Q. You know that it is his? A. I developed it.

Q. Which hip is it? A. The right.

Q. You didn't make one of the left hip at the same time? A. I did not.

(The plate is offered in evidence.)

Mr. Rogers: I object to this upon the ground that it is bound to be misleading. Evidence of that sort could not possibly be reproduced in the record.

Objection overruled. Exception.

Mr. Axtell: May I ask the plaintiff one question from the floor?

The Court: Yes.

158

Mr. Axtell: Did you ever have any accident to your right hip before?

Mr. Johnson: None.

Mr. Axtell: Or any other accident to your legs that broke any bones?

Mr. Johnson: No, sir.

(The plate is received in evidence and is marked Plaintiff's Exhibit 4.)

Exception.

Mr. Rogers: Is it possible to produce a print from this negative?

The Witness: You can, but it is very difficult, because when you develop your X-ray films for reading your reading is much better from the films proper than from a picture produced from the films, because you cannot show the details in a print that you can in the negative itself, so we always use the negative rather than the print.

159

Mr. Rogers: It shows in the reverse way, the negative?

The Witness: Yes, but you don't get the details.

160

Arthur E. Hoag—For Plaintiff—Direct.

Q. When did you make the other plate? A. January 3, 1922.

Q. You also made this one of the same plaintiff and with the same machine and the same plates?

A. Yes.

(The second X-ray plate is offered in evidence and is marked Plaintiff's Exhibit 5.)

161

Q. Will you explain this plate so that the jury will understand the nature of the bone injury from which the plaintiff was suffering when the plate was taken? A. (Illustrating with plate) This is the head of the femur, and this is the neck, and this is the greater trochanter (indicating).

Q. Will you mark on the plate with the letters A, B and C the points that you say designate the head of the femur—will you indicate that as A, and the neck as B, and the greater trochanter as C?

(The witness does so.)

162

A. There is a marked widening of the femur—that is the upper end, in the region of the greater trochanter; that is a widening from normal, and you will see a line (indicating) about three-eighths of an inch wide extending about an inch below the upper margin of the greater trochanter for about three and one-half to four inches. That is about where the callus was, or new bone. There is a widening up here at the top of the greater trochanter and also a roughening up there, an irregularity. This represents an old healed fracture, not a recent one, because it is entirely healed (indicating).

Q. How old was it? A. You can't tell. It is over six months or a year.

Q. You don't mean five or ten years? A. I couldn't tell.

Q. Can you state, assuming that the plaintiff had had no injury previous to October, 1920, and that on that date he was hurt by falling from a ladder and striking on his right hip with a piece of lead under him, can you state with reasonable certainty whether this condition resulted in the accident? A. Yes, this condition could result or would result from the accident.

Q. That is, it is a natural result to be expected from such a fall? A. It is a natural sequence of events, yes.

Q. Will you show us what should be the normal construction of that hip, what it was before the accident? What was the position of the femur?

A. That is very difficult to tell, because there is a widening here (indicating); there is a marked widening here as if the bone was driven up, in.

Q. Well, is the neck of the femur at this portion of the hip socket crushed in this particular case? A. No.

Q. It is not? A. No.

Q. Just where is the fracture? A. The upper end of the femur, in the region of the greater trochanter.

Q. Transversely? A. That I couldn't say.

Q. It is all crushed? A. It is all healed, united.

Q. Did you measure the man's leg? A. I did.

Q. What did you find to be the condition of his leg, comparatively? A. There is a shortening of the right leg; the amount is very difficult to obtain; that is, to make an accurate measurement. I got as a measurement $32\frac{3}{4}$ against $33\frac{1}{2}$ on the left leg. The man is pretty stout, and it is very difficult to get the points exact.

Q. It indicated a shortening? A. It indicated a shortening, a marked one, about three-quarters of an inch to an inch, and maybe more.

Q. In this kind of a shortening what is the result on the pelvis? A. There is a tip of the pelvis toward the shortened side.

Q. What is the result in the gait of the individual suffering from it? A. There is a limp.

Q. Is there any pain attendant upon such a condition? A. Yes.

Q. How much? A. It generally puts a great deal of strain on the knee on that side and causes pain in the knee. Sometimes they get a sort of stiffness in the knee from that condition.

Q. Is there any difference in the feeling of broken bones where a change of atmosphere occurs? A. Oh, yes; when the humidity is great or the day before a storm they generally complain of pain; that lasts for a considerable time.

Q. How long? A. A year or more.

Q. There is a permanent deformity of the plaintiff's left leg and hip? A. There is a permanent deformity of the right upper end of the femur.

Q. It is permanent? A. Yes.

Q. Is there any chance of improving it? A. No.

Q. Could massage or anything else be done for it? A. When was his accident?

Q. October 8, 1920. A. He has had about all the treatment, considering his age of fifty-two years.

Objected to as to form.

Q. Is it true that you are the consulting physician to the Standard Oil Company, and that you attend to all of their injured seamen? A. A great many of them, yes.

Q. And they have a great many ships and a great many seamen? A. Yes.

Q. Have you had any occasion to estimate for underwriters and for others the length of disability, for compensating purposes and other purposes?

A. Yes, sir.

Q. With that in mind can you estimate the degree or percentage of disability of this man for the work that he has followed as a quartermaster? A. For his work as a seaman?

Q. Yes, a quartermaster who has to get up and down a ladder. A. His disability for that kind of work is 50 per cent. or more, because I don't think he will probably ever do it again. He has ability to do some kind of work.

Q. As watchman, or somebody standing around? A. Yes.

Q. Will he have any pain in standing for a long time? A. He has pain now. I don't know how much longer that will last and how much his knee will bother him; it is impossible for me to tell. He may develop an osteoarthritis of the knee; that is, an inflammatory condition of the joints where there is a great deal of pain, due to the constant strain thrown on to that knee from the hip.

Q. Do you consider this injury of a serious character to men of this kind? A. Yes, they are serious; they are as serious as they can be.

Q. Assuming that he was injured on October 8th and didn't reach the hospital until October 15th, what effect, if any, had this delay upon his case? A. If he didn't receive any treatment, he would have a great deal of pain, probably some swelling and injury to the soft parts; that is, when he fell he injured the soft parts of his bone, and it would be markedly greater by not putting the leg up; he would probably have a great deal more eversion and would walk with his foot thrown out more; whereas, if his leg was put up in plaster or

172 *Arthur E. Hoag—For Plaintiff—Direct—Cross.*

traction, he would not have had that much of disability.

Q. You have observed a great many men who have had such injuries? A. Yes.

Q. And you have observed this man on several occasions at your office? A. Yes, and even to-day.

Q. Do you think he is affecting this limp of his at all? A. No, I do not, because I watched him when he went out of the office when he didn't know I was watching him.

173 Q. Is it possible for you to state from your examination made in July just what kind of a fracture that hip had, and, therefore, just what effect the delay might have upon the degree of the disability? A. That would be very difficult. He can't have had a transverse fracture or an impacted fracture; on the healed condition of the fracture it would be very difficult to say. An impacted fracture just simply dovetails in, or a transverse fracture would lay simply across, but with a shortening you would take for granted that he had either an impacted or an oblique fracture which shoved up slightly.

Cross-examined by Mr. Rogers.

174 Q. Was the nature of this injury so that it must be treated by X-ray observation? A. All fractures should be treated by X-ray observation, but a fracture should not be left untreated until an X-ray is taken. It should be treated immediately, and you know that they had fractures before they had any X-ray treatment. If you are in doubt, treat it as a fracture. So we teach.

Q. What do you do? Do you put it in a plaster cast, or what? A. You can put it in a plaster cast or you can put traction on.

Arthur E. Hoag—For Plaintiff—Cross—Redirect. 175

Q. What is that? A. You pull on the leg.

Q. Is a case of that sort a case for hospital treatment? A. You can treat them in the house or in the hospital.

Q. It requires some care in the treatment? A. It requires a great deal of care, yes, sir.

Redirect examination by Mr. Artell.

Q. And a hospital on a ship with a competent surgeon, a man could get fairly good treatment?

A. Absolutely.

Q. Would you leave a man in a bunk on a ship, if you were a ship's surgeon, for seven days, with an injury of that sort? 176

Objected to.

Objection sustained. Exception.

Recross-examination by Mr. Rogers.

Q. What do you mean by a hospital on a ship?

A. They generally do have a place for taking care of patients on a ship, don't they?

Q. Do you mean with all the equipments of a hospital? A. No, they have plasters and bandages, and they have a certain amount of material, even if they don't have the exact things that they have in hospitals.

Q. In small ships they don't have hospitals? A. No, but they have doctors that could make a splint. There is always plenty of wood long enough to put a man up from his neck down to the end of his feet and bandage him with. There is always that much material on board a ship. 177

RECESS TILL 2.30 P. M.

Met pursuant to adjournment at 2.30 P. M.; present as before.

IVOR OLBERS, being duly sworn and examined as a witness for the plaintiff, testifies:

By Mr. Axtell.

Q. What is your occupation? A. At the present time I am clerk and draftsman.

Q. In whose employ? A. Mr. Axtell's.

179 Q. You are talking about me? A. Yes.

Q. Do you work for me at my office? A. Yes.

Q. Did you go on board the steamship *Allianca*?
A. I did.

Q. You are also a client of my office? A. Yes.

Q. You have been to sea for many years? A. Yes, about nine years; not quite.

Q. And you are filling in your time to make a living in drafting and investigating claims, etc.?
A. Yes.

Q. Was Mr. Woods on the bridge and making some observations as to the gear and as to the equipment? A. I did.

180 Q. Mr. Rogers: You do not contend that there has been any change in the equipment of the ship since the accident?

Mr. Axtell: I want to know——

Mr. Rogers: No. I don't know what you have in mind, but I don't know of any change.

Mr. Axtell: If you object to this evidence without my calling one of your deck officers——

Mr. Rogers: It depends on what you want to prove.

Q. This diagram, Exhibit 3, I show you. Did you make this drawing? A. I did.

Q. Is that drawn from measurements that you made on the ship? A. That is drawn from measurements I made on board the ship.

Q. On what scale? A. This is one-eighth of an inch to one foot. That is the front part of the bridge, and the rest is only according to what I observed.

Q. That is, the side view is not as to the exact measurements? A. No, not the side view.

Q. I point to this door on the right with some red marks, leading to a stairway. Is that the approximate position of the door? A. Yes.

182

Q. And it leads into what room? A. It leads into the cabin, the dining saloon, as far as I can tell, and there was a big saloon there.

Q. Was there any ladder leading from this deck on either port or starboard side? A. On the outside of the saloon?

Q. On the outside? A. No, sir.

Q. That diagram represents approximately the layout of the ship except as to the front of the bridge, and that is as exact as you can make it? A. Yes, sir.

Q. I show you another drawing and ask you if you made this drawing also, which is not in evidence? A. I did.

183

Q. Is that made from measurements as well? A. That is made from measurements as well, scale of one-half of an inch to one foot.

Q. Will you give us the distance—we will use Exhibit 1, this photograph—from the top rung of the ladder to the top of the wooden rail? A. That means the top of the wooden rail of the bridge?

Q. Yes. A. That is two feet, one inch.

Q. What is the distance from the top of the wooden rail on the bridge to the upper jackstays?
A. Three feet.

Q. Making a total of five feet, one inch from the top of the rail to the upper jackstay? A. Yes.

Q. Were there any hand grips or anything to take hold of there, at the top of the ladder, except as shown? A. No, sir, there was no hand rail on that ladder and no hand rail leading up above the top of the ladder.

Q. Did you examine the article referred to as the cloth, the dodger across the top of the bridge? A. I did not examine the dodger itself that was there,
185 for it was all nailed up on top of the bridge railing. It was not stretched.

Q. Did you measure it at one end? A. Not the end; but I measured a stanchion right in front and it showed the height of one end, eight inches above the top of the bridge rail.

Q. That was where the canvas stopped? A. Yes.

Q. What weight canvas was it? A. Well, I should say about medium weight, a little heavier.

Q. Was there any rope on the edge of it? A. There was a leech, yes.

Q. Did you observe the size of the leech? A. I did not, but I would say it was perhaps twelve feet, the round was as thick as my forefinger.

Q. Was there any other method of getting from
186 the forward well deck to the navigation bridge, other than this ladder, or going through the passengers' quarters? A. There was no other way; we got up there, Mr. Woods and I, we had to walk in through the passengers' quarters.

(The sketch is offered in evidence.)

Mr. Rogers: I have no objection except that I think this dodger doesn't seem to have

been formed with any exact measurements and is probably misleading in that regard.

The Witness: That is practically the same in every ship, two feet, eight inches.

Objection overruled. Exception.

(It is marked Exhibit 6.)

The Court: The drawing may be exhibited to the jury.

(The drawing is exhibited to the jury.)

Q. You said you had been going to sea how many years? A. Closely figured, about eight years and seven months.

188

Q. Have you had different ships—have you observed the rigging and gear of other vessels? A. Yes.

Q. Are you a licensed A-B? A. I hold an A-B certificate.

Q. You are eligible to take a third mate's examination? A. Second mate.

Q. Have you been on passenger ships during this time? A. I have.

Q. Have you seen vessels of the general construction of the *Allianca* where they have a bridge like this and passenger quarters right aft of the bridge? A. I have.

Q. Have you observed ladders on the front of the bridge? A. I have.

189

Q. Will you state whether, in your opinion, this ladder as to guard rails, hand rails, etc., is in accordance with the general practice? A. I would not say that; it is a very old ship; in fact, I have never seen a ladder like this one on them, that I can recall. I don't think I have ever seen one.

Q. In what respect is it different? A. Well, I haven't seen ladders—this is an emergency ladder to be used in cases of emergency, and such ladders

190 *Ivor Olbers—For Plaintiff—Direct—Cross.*

I have seen with a hand rail sticking up far enough so that you can get a hold on it in getting over.

Q. Projecting above the ladder itself? A. Yes.

Q. On how many ships have you seen such ladders? A. Oh, I remember three.

Q. Can you give their names? A. The Lakeview, the El Mondo—

Q. The Lakeview is a Shipping Board boat? A. Yes, and the El Mondo is a Southern Pacific, going between here and New Orleans, and carrying passengers.

Q. What other ships? A. The El Dia of the same company. I remember other ships also, but I cannot give their names.

Q. Have you sailed on other ships than American ships? A. Yes.

Q. What is the practice with regard to other vessels as to the equipment of the ladder leading from the deck to the bridge? A. Practically the same.

Q. Is it customary to permit the quartermaster to go through the passengers' quarters in their old clothes?

Objected to.

Q. So far as you have observed?

Objected to.

192 The Court: I doubt the materiality of the testimony.

Plaintiff excepts.

Cross-examined by Mr. Rogers.

Q. Your diagram does not show the measurement between the rounds, does it? You have not indicated them upon the diagram? A. I started putting them on there, but I did not finish.

Q. How far apart were the rounds? A. The rungs of the ladder?

Q. Yes. A. One foot was one inch.

Q. That would be about a clearance of twelve inches between the rounds? A. Yes.

Q. And the rounds were about an inch in diameter? A. More than that.

Q. A little over that. Above the last stop upon the ladder there were two standards of uprights? A. Yes.

Q. Indicated here (indicating)? A. Yes.

Q. What was the distance between these and the bridge rail? A. The top of the bridge rail? That is one foot exactly.

Q. How would that terminate? By a ball? A. This at the top is just covered with an elbow rounded out and running into the bulkhead.

194

Q. How far out from the bulkhead did the ladder extend? How much clearance? A. At the top it stands out $4\frac{1}{4}$ inches, or $4\frac{1}{2}$ inches, I should say.

Q. It is about the same distance all the way up? A. No, at the bottom of the bridge it stands out from the bulkhead of the saloon one foot four inches.

Q. Would it stand out one foot four and then it would slope inward till the top stands out about four inches? A. The bridge extends over the saloon about one foot.

Q. The ladder is perpendicular or is it inclined? A. It is just an upright ladder.

195

Q. What do you mean by an emergency ladder? A. I mean a ladder that is used in case of emergency; in case of a fire or in case of disaster.

Q. You made a statement—I don't think it is a matter of much importance—that outside of this particular ladder and the stairway there were no other ladders leading from the saloon deck to the bridge deck. Is that correct? A. There were no other ladders that I could see. I went from amid-

ships as far as up forward and I didn't see any stairway all the way through as far as I could see.

Q. I have a diagram here in my hand, or a plan of the ship, indicating that a short distance to the rear of the doors leading into the saloon deck are two upright ladders, one on each side of the ship. Did you notice these? Examine this diagram and see whether you observed these stairways or ladders here? A. I did not observe them. I was not as far aft as that. That is abaft the beam. Mr. Woods and I were looking around on the starboard side to get up there.

197 Q. Well, you wouldn't say that that was the only ladder leading from the saloon deck to the bridge deck? That is the only one that you observed. You do not mean that abaft the beam there were no other ladders? A. It was not visible. I did not walk around, but we were a little puzzled to know about getting up to the bridge. I think it was the purser who guided us into the saloon and upstairs.

Q. It is customary to have these canvas dodgers on the bridge, isn't it? A. Yes, sir.

Q. What is the general purpose of these dodgers or weather cloths? A. To protect, or keep the wind off and the seas, in case of hard weather.

198 Q. In what kind of weather is it customary to keep these cloths up, as you have indicated in the second diagram? What kind of weather do they usually stretch the cloth, as indicated in your diagram, Exhibit 6? A. I have seen it used from leaving port until arriving in some other port, and I have even seen it up until it decayed.

Q. Well, is it stretched, as you have indicated in that diagram, in calm weather or only in stormy weather? A. Well, usually in calm weather they let it down and clew it up.

Q. Is it around the bridge rail at the top of the bridge? A. Well, not on all ships; they do it different ways. They don't have jackstays on all bridges. They have the dodger made fast right on top of the bridge.

Q. In other words, on some bridges they have a jackstay, which is a rail running a little below the top of the bridge rail? A. Yes.

Q. And they clew it around that? A. They lift it right on top of the bridge, on the rail.

Q. That is where they don't have the jackstay? A. Yes, or little ring bolts, either; something to make it fast.

Q. But anyway, either around the jackstay or the top of the bridge stay it is customary to clew it around when the weather is clear or not rough? A. Yes. 200

Q. Is this the ordinary form of weather cloth dodger? A. That is the ordinary form, yes.

Q. You spoke of bringing the end of the ladder, in some ships that you have observed, over the bridge rail. Do you mean to say that it is brought up and looped over the top of the bridge rail? A. The hand rail, yes, the upright; or it extends straight up the ends up here, something like this (illustrating).

Q. You have observed that on certain ships? A. Yes, I have observed that on certain ships. 201

Q. And on other ships have you observed this same kind of ladder? A. Well, the ladder would be practically the same on all the ships; only they use stops on some ladders, and this is an iron pipe.

Q. Does the form or construction of that ladder vary on different ships, somewhat? A. They do as to the size of the pipe, I should think; I never measured any of them.

202 *Ivor Olbers—For Plaintiff—Redirect—Recross.*

Q. Is there any particular standard form of construction of this emergency ladder? A. Well, I don't know of any other form than just that form when it is made out of iron pipe.

Redirect examination by Mr. Artell.

Q. I understood you to say on direct examination that the majority of ships you have observed have a side rail extending up on the top of the bridge? A. Yes, I mean the upright; the ladder is practically the same, only it extends further.

203 Q. It is all the same only it is different. Is that what you mean? Now, what is the difference? A. The difference is in the top of the ladder; the upright girders up above the rail; that means that the upright is at the same time a hand rail.

Q. How much difference in length is there? A. On this ship it should have been three feet.

Q. Three feet longer than it was? A. Yes.

Recross-examination by Mr. Rogers.

Q. What do you mean by the ladder being three feet longer? If it had been three feet longer than it is, the top of the uprights being only about a foot below the bridge rail, that would have carried the ladder two feet above the top of the bridge rail?

204 A. Yes.

Q. You don't mean to say that it is customary to carry the ladder up so that the ladder reaches two feet above the top of the bridge rail? A. I have seen that.

Q. That must be a very unusual form of construction? A. I have seen it on these three ships, and more ships.

Q. Right in the front of the bridge the ladder rises up above the top of the bridge rail? A. Not exactly in front.

Q. Don't you realize if the ladder reached above the top of the bridge rail that it would interfere with the use of the canvas dodgers, and also with the free use of the bridge to some extent? A. I don't see how it would interfere with the use of the dodger. They could put the dodger on the inside or the outside.

Q. In the three ships that you have seen the ladder not only reached to the top of the hand rail, but was about two feet above it. Is that right? A. Well, about two feet or about a foot and a half it lays above the hand rail.

206

By the Court.

Q. What was on the bridge rail? Was there a railing like this in front of the bridge? A. Yes, there is a railing, only it is closed in.

By Mr. Artell.

Q. Solid woodwork? A. Yes, solid woodwork.

Q. It is a wind break? A. Yes.

Q. And they put the dodger up above that in order to further break the wind when it is bad weather? A. Yes.

Q. There is nothing to interfere with having this kind of a ladder just like that fire escape on that building across the street (indicating), curved up over, and you can pull your dodger right up underneath the arch; isn't that so? A. Yes.

207

Q. And isn't that the usual construction? A. Sure.

Q. I show you some photographs. What is this? A. That is the photograph of a similar ladder reaching up to the bridge of a ferryboat.

208

Ivor Olbers—For Plaintiff—Recross.

Q. Where was that taken? A. That was taken on the ferryboat Brooklyn.

Objected to.

Q. Did you take it? A. Yes, I took it.

Objected to.

Q. Does it lead to the bridge? A. It leads to the bridge.

(The photograph is offered in evidence.)

Objected to.

209

Objection overruled. Exception.

(It is marked Exhibit 7.)

Q. Just look at this other one. Did you make this from another ferryboat here in the harbor? A. Yes.

Q. Do these ladders lead up to the bridge of the ferryboat? A. There is no bridge on the ferryboat; they lead up to the pilot house, yes.

Q. It is used by the pilots and others that go up there to get up to the steering apparatus? A. Yes.

(The photograph is offered in evidence.)

Objected to on the ground that the ladder used on the ferryboat is not used on steamships.

210

Objection overruled. Exception.

(The photograph is marked Exhibit 8.)

Q. Did you endeavor to get on board some coast-wise vessels here in the harbor, such as the United Fruit liners and the Morgan Line and others that you have testified about within the last few days, to make photographs of the ladders leading to their bridges? A. Yes.

Ivor Olbers—For Plaintiff—Recross.
John Sargeant—For Plaintiff—Direct.

211

Q. Were you permitted to go on board any such vessels? A. No, sir.

Q. What did you do? A. I went to the United Fruit Company and tried to get a pass to permit me to go on board.

Q. Were you provided with a letter stating definitely the purpose of the request, over my signature? A. Yes.

Q. And it was still refused? A. It was still refused.

Mr. Rogers: I move to strike that out.
 The Court: Motion granted.

212

JOHN SARGEANT, being duly sworn and examined as a witness for the plaintiff, testifies:

By Mr. Atell.

Q. What is your occupation? A. I am a licensed mariner.

Q. How long have you been going to sea? A. A little over thirty years.

Q. Where do you live? A. When I am ashore I live at 375 2nd Street, Brooklyn.

Q. Are you married? A. No, sir.

Q. What license do you hold? A. I hold a second mate's license.

213

Q. In what merchant marines have you served in your time? A. I have only served in the American Merchant Marine, in the United States, and the British Navy, twelve years in each.

Q. You are an American citizen? A. Yes.

Q. And formerly you were a British citizen? A. Yes.

214

John Sargeant—For Plaintiff—Direct.

Q. You have heard the testimony in this case and know about this ladder, etc., and have seen the photographs? A. Yes.

Q. I show you Exhibit 1. Is that the type of ladder that is commonly provided for the front of bridges of vessels engaged in the freight and passenger trade of the United States?

Objected to as improper.

Objection sustained. Exception.

215

Q. Will you tell us on how many merchant ships you have been employed? A. In the last two years I have been employed on three ships: the steamship Jekyll of the States Marine of Baltimore, the steamship Limon of the United Fruit Company and the steamship Ida belonging to the United States Shipping Board.

Q. In what trade do these ships navigate? A. The Jekyll was in the trade to the Baltic, from Baltimore to the Baltic. In the United Fruit, from Philadelphia to Colombia, Colombian ports, and in the Ida the passage was from Dantzic Free State to Norfolk, Virginia.

Q. Have you observed the bridge gear of other ships than these three during your experience? A. Oh, yes, a great many ships.

216

Q. You have been on board many ships on which you have not been employed? A. Yes, sir.

Q. How many different vessels have you observed the kind of ladder that they have on the front of the bridge, where they had one? A. Well, in different classes of ships; in some classes they have a regular ladder that leads up to the deck above the well deck, and there is another ladder leading forward, which leads up to the bridge. In other ships I have seen a ladder different altogether

from the one on the exhibit, where the rungs are riveted right into the bulkhead, with no rail at all. On two or three ships I have observed a ladder similar to this one, but the pipe rail extended up over the rail I should say approximately about a foot, coming over in an angle on to the rail of the bridge, which is the permanent rail, and the rail is either metal or wood, according to the construction of the ship.

Q. Is it customary to have hand rails on ladders leading from the decks to the various higher decks and the bridge of the ship, in the merchant trade?

Mr. Rogers: What do you mean by a hand rail? 218

Q. A rail going all the way up, or is it customary to have a ladder going within a foot of the top, like this one?

Objected to as not a proper question.
Objection sustained. Exception.

Q. Will you state what is the usual and customary method of construction as you have observed it of ladders used for such purposes as this one was on the front of the bridge? A. You would not find many ships to-day with a ladder constructed like that. This is an old-fashioned ship. Most of the ladders that you find to-day are regular built ladders, a wooden ladder with a pipe rail handle on either side; but I have seen a ship somewhat like this—this has got only one bridge, and I have seen ships with such a ladder having two bridges where this ladder would extend up to the upper bridge. Therefore, it would be simple for a man to climb up this ladder and step off on

to the rail and he would still have hold of the rungs above him.

Q. What would be the proper way for a man going to climb up there on a windy night, when the ship was digging into the sea a little—not too windy, but fairly windy, the night dark, and there was a canvas dodger of the usual type and description given in this case, erected—what would be the proper way for him to get over it?

Objected to as not a proper question.

221 Q. How long did you work as a quartermaster before you were an officer? A. Well, about—well, I have been a quartermaster for about twenty-four years.

Q. And you are still a quartermaster? A. Yes.

Q. Do you know how to take a lead sounding? A. Yes.

Q. Do you know how to carry the lead and line over your shoulder? A. Yes, I could carry it on my shoulder, but I would carry it in my hand.

Q. Well, you know how to climb up a ladder, and you have observed it being done? A. Yes.

222 Q. What would be the proper way to get over such a place as this? You heard the testimony of the plaintiff. Was he doing it in the usual and customary way? A. Myself, I would not climb over a ladder with a dodger there. I would have gone around through the passageway into the saloon, regardless of the steward's orders.

Q. Well, you are an officer of the ship? A. Yes.

Q. And you are not seeking a job as quartermaster? A. No, I would not take a job as a quartermaster to-day.

Q. That is why you are an officer, in my opinion. That is all.

John Sargeant—For Plaintiff—Cross.
John E. Gehris—For Plaintiff—Direct.

223

Cross-examined by Mr. Rogers.

Q. Would you consider it safe to catch hold of a dodger if it should be up, and try to hold on to it and pull yourself up by the dodger? A. No, sir, not if there was any other way that I could get up.

Q. It is not too fragile to support the weight of a man, is it? A. Well, the stops up to the jack-stays up above, they are liable to yield or part at any time because they are working in the wind all the time, and they may have made a slip knot in the dodger, and therefore the stop might give way. 224

(Another photograph is offered in evidence and is marked Exhibit 9.)

JOHN E. GEHRIS, being duly sworn and examined as a witness for the plaintiff, testifies:

By Mr. Artell.

Q. What is your occupation? A. Licensed mariner.

Q. How old are you? A. Thirty-seven.

Q. Where were you born? A. In Pennsylvania. 225

Q. How long have you been going to sea? A. About twenty-two years.

Q. What license do you hold now? A. A master's license.

Q. How long have you held that ticket? A. About very near two years.

Q. Before that did you have a mate's ticket? A. Yes, about fifteen months.

Q. You have been going to sea and started as an ordinary seaman, started in when you were a kid?

A. Yes, a boy.

Q. Have you been aboard vessels plying in the West India trade in the passenger service? A. Yes, in the Ancon, the Panama Line.

Q. The same company as this? A. Yes, and the Esperanza of the Ward Line, and there are several schooners some years ago.

Q. Have you been in other steamships besides those, which you have observed? A. Oh, yes, a dozen or more.

Q. How many have you observed the rig on that you were not on board of as an employee? A. I can't tell you the exact number.

Q. More than one? A. About a dozen or more, I have noticed.

Q. You have seen dozens of ships at sea in your experience, meeting and passing them? A. Yes.

Q. But you paid no particular attention to their bridge work? A. No, sir, unless I should go on board of them.

Q. But being an officer you would notice differences? A. Yes.

Q. I show you Exhibit 1 in this case, showing the bridge of the Allianca, which shows that the top of the ladder stopped at the lower bridge rail, it stopped about a foot below the top of the bridge rail. A. Yes.

Q. And there is a strake running along there? A. Yes, the jackstay.

Q. That is for the purpose of securing the bottom of the dodger? A. Yes.

Q. That could be higher than it is on the rail, could it not? A. It could be made fast right underneath the top of the rail.

Q. It could be closer to the top? A. Yes.

Q. Which would permit the ladder to go further, even a straight ladder? A. Yes.

Q. And there is room enough for a ring at the top of the ladder? A. Evidently, either a ring or a hand grab.

Q. Is there any essential difference between the type of ladder which is ordinarily supplied for the front of the bridge and the type supplied for other parts of the ship, for getting from one deck to the other, like the after end of the boat deck? A. Well, no; there is hardly any difference on a straight ladder, or pipe rail ladder.

Q. Do you consider that this kind of a ladder was sufficient for this kind of work?

230

Objected to.

The Court: The question is really the same question that comes up in the railroad cases in regard to the hand hold on the top of a ladder on a box car, isn't it? The ultimate inquiry is for the jury rather than for any particular witness, as to whether it is reasonably safe, isn't it?

Mr. Axtell: I think probably your Honor is right.

The Court: The limit of the inquiry is as to how they are built and how they are not built. I will ask the jury to disregard it. Objection sustained.

231

No cross-examination.

GEORGE R. MCNAMEE, being duly sworn and examined as a witness for the plaintiff, testifies:

By Mr. Artell.

Q. You are a licensed officer? A. Yes.

Q. American? A. Yes.

Q. Where do you come from? A. I was born in Massachusetts.

Q. How long have you been going to sea? A. I have been going to sea since 1911, about ten years; nine or ten years.

Q. Have you been on board vessels engaged in the West India passenger trade? A. Yes, I have been to the West Indies and the west coast of Africa, and South America and Europe.

Q. Have you ever been on board the *Allianca*? A. No, I have not.

Q. You have heard this testimony? A. Yes.

Q. I show you Exhibit 2. That is the front of the bridge of the *Allianca*, the ladder from which the plaintiff fell while he was at the top and trying to get over a dodger which was stretched across the top of the bridge rail. Will you state whether or not that ladder is constructed as ladders for that purpose are ordinarily constructed on merchant ships?

Objected to.

Objection sustained. Exception.

The Court: The inquiry should be narrower.

Q. How have the ladders that you have seen been constructed? A. The ladders that I have seen are like on merchant ships; if you come from the lower deck you would come up the ladder on the slant with hand rails on.

Q. Little stairs? A. Little stairs.

Q. Where they have a ladder perpendicular like this, against the bulkhead, and it comes up to something over which you have to climb, is it customary to have that stop a foot from the top?

Objected to as before.

The Court: Objection sustained. I think the conclusion as to the custom is incompetent; but as to what kind he has seen, ask him that.

Q. What have you seen and how are they built?

A. Those that I have seen built was going to the bridge—no matter whether it is from the well deck or to the lower deck or the upper deck, the majority of the ladders are slanting with hand rails similar to stairs, only hand rails on each side. 236

Q. Have you seen any like this? A. Yes, I have seen them like this and I have seen them extend higher than that.

Q. You have seen them go over? A. Yes, over the top.

Q. Have you seen any like this? A. I have seen them—no, I haven't seen them constructed like this.

Q. You have never seen any as short as this? A. I have seen them go a little higher than that.

Q. So that you can have something to hang on to when you get to the top of the bridge? 237

Objected to.

The Court: I think that is a proper inquiry. It may be that the form of the question is leading, but the inquiry seems to me a proper inquiry.

Exception.

238 *G. R. McNamce—For Plaintiff—Direct—Cross.*

Q. The ladders that you have observed, have they been higher than that ladder or short like that one? A. They have been higher than this, in this same construction as this ladder.

By the Court.

Q. What is the effect of their being higher, on the person climbing up there? Does it give him any additional support? A. Yes.

239 Q. In what way? A. I have seen them like on this last ship that I was on; there was a ladder like this one that came to the lower bridge and that came up higher than that; in fact, there was no dodger to interfere because we carried no dodger on the lower bridge, and you could come up with that one almost to the top and then put your leg over and get over. There was another one aft that came up to about where this locker was (indicating). That ladder extended up with a rail going over the top and fastened to the deck, where you could walk to the top and still have your hands on the rail of the ladder that you were climbing.

Q. You said you never saw one on a ship like this one. A. Not as short as that.

Cross-examined by Mr. Rogers.

240 Q. Is it constructed—have you had experience in navigating a ship from the bridge, to take bearings and things of that sort? A. Yes.

Q. Don't you know it is important to keep the rail in front of the bridge as clear as possible? A. Yes.

Q. There should not be anything above the rail to interfere with your observation? A. Well, you have got a dodger on the rail, but that is just for

protecting purposes. You lower that when you want to take a bearing.

Q. But it is a universal custom with reference to bridge rails and the bulwark of the bridge to keep that clear of obstructions of all sorts? A. Yes, if there was nothing on top of it.

Q. And you would not want a ladder going two feet above the hand rail on the bridge? A. Well, it would not necessarily run up two feet above; if it was out far enough it could run up two feet above.

Q. Well, would a navigating officer on a bridge want anything to rise above the hand rail of the bridge? Isn't it desirable to keep them aview in front as much as possible? A. Yes, as much as possible.

242

Q. So about all you can expect, if you wanted to keep the rail in front of the bridge clear, would be a ladder that would come up approximately near the top of the hand rail? A. Well, as near the top as possible.

Q. But not to overlap the top? A. Well, not on the upper bridge.

Q. That is what I am talking about; not on the upper bridge where the ship is navigated from? A. That would be according to the construction. You would have to take that into consideration.

Q. And if it is desirable to keep the upper bridge where they navigate the ship clear and free, as clear and free as possible, except when it is necessary to protect themselves with the weather cloth, if that is true, you would not want any ladder rising up above the hand rail on the bridge, would you? A. No.

243

244 *G. R. McNamce—For Plaintiff—Redirect—Recross.*

Redirect examination by Mr. Artell.

Q. What objection is there to the hand rail going above the bridge? A. Well, it could go up—the only objection is according to the construction of it. It might interfere with the compass or with the vision.

Re-cross examination by Mr. Rogers.

245 Q. These ladders that come up and are bent over, are they the ladders to the rear of the bridge, and places of that sort, where they would not interfere with the navigation of the bridge? A. The ones that I have seen——

Q. You see them at the rear of the bridge? A. The ones that are right aft of the boat deck?

Q. Yes, back at that part of the ship. A. Yes.

By Mr. Artell.

Q. Have you ever worked on ships that carried passengers? A. Always with the Quebec Steamship Company, and they took one German ship, but they changed the name of it.

246 Q. Who is boss in the place where the passengers are carried? The chief steward or the mate? A. Well, either the chief steward or the purser would look after the passengers.

Q. The mate looks after the bridge and the navigation of the ship. He is the executive officer under the captain, isn't he? A. Yes, he is the executive officer under the captain.

Q. The word of the chief steward, does that go as to anything out of his jurisdiction? A. Within his jurisdiction, yes; what he says goes within his jurisdiction.

George R. McNamce—For Plaintiff—Recross.

247

Q. And he would have a right to exclude a man from the passengers' saloon, a member of the crew?

A. Yes, he would.

Q. And he ordinarily does? A. Oh, yes, yes.

By Mr. Rogers.

Q. Did you ever know a steward to disobey an order of the chief mate with reference to the freedom of seamen and of other members of the crew—

Objected to as immaterial.

Objection overruled. Exception.

248

Q. Did you ever know of a steward disobeying orders of a chief mate with reference to the management of the crew or the movements of the crew, and then hold his position after that? A. Well, you don't usually disobey them if you want to hold your job. The chief mate is not in charge of the steward's department, though.

Q. He is in charge of the operations of the crew. He is the executive officer, isn't he? A. The chief mate is, yes, sir.

Q. Would not the steward forfeit his position on a ship if he tried to overrule the instructions of the chief mate of the ship? A. The chief mate has nothing to do with his department.

249

Q. I am talking with reference to the movements and operation of the members of the crew. Would the steward attempt to disobey the orders of the chief mate with regard to that? A. Well, the chief mate—well, yes; he could disobey his orders if he wanted to. Some would and some would not.

Q. But he would be taking an awful chance if he disobeyed the chief mate's orders? A. I don't know what the orders might be.

250 *George R. McNamce—For Plaintiff—Recross.*

Q. Well, if the chief mate told the steward—if you had a seaman go up the steps when he was putting away the lines, the plumbing lines of the ship, the sounding lines, do you think that any steward would attempt to disobey the chief mate's instructions in that regard? A. Well, yes, he might.

Mr. Axtell: Objected to on the ground that this is going too far in the realm of speculation.

251 The Court: The plaintiff's testimony is that on the particular occasion in question the commanding officer told him to go up the ladder that he did go up. That is all the evidence that we have before us now on that proposition. There were other occasions spoken of, but I do not see the relevancy of them at this time exactly. I do not see that this inquiry at this time is material or relevant. Objection sustained.

Exception.

Mr. Axtell: As to Exhibits 7 and 8, it is possible that if this case should be considered by a higher court, in their vast knowledge they might.

252 The Court: You should offer them in evidence if——

Mr. Axtell: I ask to withdraw them. I have not shown them to the jury.

The Court: They may be withdrawn, and not shown to the jury.

WILLIAM MICHELSON, being duly sworn and examined as a witness for the plaintiff, testifies:

By Mr. Artell.

Q. What is your business? A. Seaman.

Q. How long have you been going to sea? A. About ten years.

Q. You are an A. B.? A. Yes, sir, I am an A. B.

Q. Do you know the plaintiff? A. Yes, I know him.

Q. You testified in this case before trial, on July 26, 1921, before a notary public? A. Yes.

Q. Mr. Stephen Crick, one of my associates, examined you? A. Yes, sir. 254

Q. Since then have you been to sea? A. Yes, sir.

Q. And you got back into port recently? A. Well, yes, a short while ago.

Q. You were subpoenaed to come to this case? A. Yes.

Q. Did you see the accident to the plaintiff? A. Well, I didn't see the accident, but I saw him laying down at the foot of the ladder on the saloon deck, which was leading from the saloon deck to the navigating bridge.

Q. What was his condition? A. He was laying down on deck.

Q. What time was that? A. About ten minutes or so past 8 o'clock. 255

Q. What watch were you in? A. I was in the 12 to 4 watch.

Q. And he was on the four to eight? A. Yes, he relieved me at 4 o'clock.

Q. You had been off watch for four hours? A. For four hours, yes.

Q. What were you doing around there at that time? A. The storekeeper told me down by my

room that Andrew Johnson had fallen down, and I asked him where, and he said up at the foot of the ladder.

Q. And you went up there? A. I went up there, yes.

Q. Did you help carry him off? A. Yes, I helped carry him; me and another one carried him down.

Q. Was he suffering any? A. He hollered a certain amount; he made an attempt a couple of times to get up, but he couldn't, it seemed to me.

Q. Did you notice his leg? A. Nothing special; we took him down in his room and his bunk was on top and the doctor told me to put him in my bunk, because my bunk was the lower bunk athwartships.

Q. Had they a hospital on the ship for treatment? A. Well, I don't know of any hospital except the surgeon's room.

Q. How many passengers were there on board at that time? A. Maybe fifty or sixty, but I don't know exactly.

Q. How many stewards were there? A. They carried two stewards and the deck steward.

Q. How many in the whole stewards' department? A. I don't know exactly, but I guess thirty-nine.

Q. And they had deck stewards and saloon stewards and room stewards, and there were more stewards than there were in the whole rest of the ship? A. Well, I would not say more.

Q. To get from the forward well deck when you have been taking a lead on the bow, or anywhere else, you want to put the lead back on the bridge where it belongs, could you go up through the passengers' quarters to the bridge? You could, could you not? A. Yes, we could.

Q. Were you permitted to do so on this ship? A. The first trip I made on that ship I was caught

one day by the chief steward going through the alleyway which was leading to the stairway, and the stairway leads up on the bridge deck, and I had a lead line on my shoulder, and I happened to run in through the door and ran in past the steward, who was coming out, and he said, "What are you doing there?" and I said, "I am going up on the bridge," and he said, "I thought I told you fellows not to run around here with anything on you, carrying anything." I said, "You haven't told anything to me," and he said—

Q. Well, he didn't let you go through? A. He said, "Are you one of the new ones?" And I said, "Yes," and he said, "Well, I am telling you now." 260
And that is all. He didn't let us go through.

Q. Do you have to go through the place occupied by the passengers as a lounging room to get to the bridge? A. We have to go through the passengers' place, a passageway leading to the dining saloon, and all along the passengers' staterooms.

Q. Did you ever go up this ladder where Johnson was found? A. Yes, sir, I have.

Q. How did you come to go on that ladder? Was it a good safe ladder, sound, or did you have any difficulty? A. The ladder is sound and it never shakes.

Q. Can you get up with it all right? A. Well, I did make it out all right; but I think it is a very 261
bad ladder; a couple of times I almost slipped, myself. I just held myself, without having that dodger up.

Q. How old are you? A. Twenty-five.

Q. You nearly slipped when there was no dodger? A. Yes, because on the rail in front of the ladder there was a brass between.

Q. Do you mean a strip of metal made of brass? A. Yes, and it was nailed on the rail around there,

so that it would keep from wearing out the rail. It the night time, when there was dew, this brass was very slippery, and inside of the rail I didn't have much of a grip and when I reached for the rail there was no dodger up—I reached the rail so (illustrating); I held it like that (illustrating); and so a couple of times I almost fell, but I just managed to grab it again.

Q. Were there no hand grabs there? A. No, nothing but the side of the ladder.

Q. Were you around there the day after the accident? A. Yes.

Q. Did you do any repair work there? A. Me and Nelson were putting some stops in the dodger.

Q. Did you observe anything wrong with it? A. Yes, we put in a couple of new stops.

Q. Whereabouts? A. On the port side of the bridge. We had two dodgers, one at the starboard and one at the port.

Q. Anywhere near this ladder? A. Well, I guess it was a couple of feet or so the port side of the ladder. I couldn't say exactly to an inch.

Q. Will you indicate on this Exhibit 6 whereabouts it was? A. Somewhere around here; on the port side of the ladder (indicating). But I suppose we had more stops than that. Here are only five or six.

Q. And you think they were closer together than they are there? A. Yes, I think so.

Q. Do you remember anything particularly about them? A. No, I don't think so.

Q. What size lines were they? A. Nine-thread lines.

Q. What is a nine-thread line? A. It is about the size of my little finger; about three quarters of an inch in circumference.

W. Michelson—For Plaintiff—Direct—Cross.

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Q. In the morning was the dodger still up? When did you do this work of putting in the new line?

A. That was the next day, the next afternoon.

Q. At what time? A. Well, anywhere up to 12 o'clock, or up to 1 o'clock, I think it was. It was my watch on, and my watch was from twelve to four.

Q. Were any of them carried away completely or were they just frayed a little bit, those that you replaced? A. I think one was carried away and the others looked shabby, so we had to replace them.

Q. Did you think anything about it in connection with this accident? A. Well, I don't know.

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Q. Were you ever asked anything about it at my office this summer when your testimony was taken in this case? A. No.

Q. Did you tell anything about it at the time? A. No, I haven't.

Q. When did you first mention the fact to me, about this business, the nine-thread line? A. After you are asking me now.

(Adjourned till to-morrow, January 10, 1922, at 10.30 A. M.)

Brooklyn, January 10, 1922.

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Met pursuant to adjournment; present as before.

WILLIAM MICHELSON resumes the stand.

Cross-examination by Mr. Rogers.

Q. Do you mean to say that you have made no statement to Mr. Axtell before you got on the witness stand, about this additional statement? A.

8
9

Not any statement. I gave him testimony last June.

Q. When you gave your deposition you didn't refer to the question of the cloth, did you, in any way? A. I don't quite understand you.

Q. When you gave your deposition you made no reference to anything about the weather cloth?

The Court: That is, about fixing up these stops on the weather cloth.

A. No, sir, I did not.

269 Q. Where did you take the weather cloth for the purpose of fixing up the stops on it? A. Just fixed the stops while she was bent on the jack-stay.

Q. You had to go up on the bridge and work on the bridge for that purpose? A. Yes, I had to go up on the bridge and work on the bridge for that purpose.

Q. Who told you to do that? A. Well, nobody told me then, but we always understood that if there was anything to be done that was necessary we always did it.

Q. Do you mean to say that you went up on the navigating bridge without instructions from the mate or officers to do repair work upon the weather cloth? A. No, my watch was on the bridge.

270 Q. You were acting as quartermaster on the bridge? A. Yes.

Q. Are you going to tell the jury that while you were acting as quartermaster on the bridge by the wheel, with which you were directing the movements of the ship, that you left there to make repairs on the weather cloth? A. No, sir.

Q. What do you mean to say? A. When the ship was laying at anchor in the port.

Q. But you say it was the next day after the accident that you did this, and then, according to

the plaintiff, the ship had left the river and was at sea? A. Well, the next day we went into another port; if it was Balboa, or one of the ports—I don't remember which was the first. It was one of the next ports that we went to from Guayaquil.

Q. You, on your own responsibility, went— A. I always do the same work on the bridge, and also did that, because I saw it was needed.

Q. What are your duties? A. When the ship is at sea I would steer the ship or do other things, and while she is in port, on that ship we always use to work on the bridge and sometimes stand at the gangway in some places.

Q. Don't you know that under rules and practice which is kept to upon the ship you would not do any work unless you were told to by a superior officer? A. Well, little things, cleaning brass around the bridge, and doing little things, we do it ourselves.

Q. That is usually done by seamen, is it not? A. No; we cleaned the brass grating and the inside of the wheelhouse, and we also cleaned around the bridge.

Q. The quartermaster is not supposed to be going around the ship doing repair work, is he? A. No, but on the bridge deck——

Q. On the bridge? A. Yes.

Q. How long did it take you to do this work? A. Half an hour or so.

Q. What was the nature of the work? A. When I had finished cleaning the brass all I had to do was to sweep up around the deck and fix up the dodger a little.

Q. What did you do to it? A. I put in one or two new stops and a little whipping in others on the end of the dodger.

Q. Did you do that with a needle or with your hands? A. Yes, just a twine and a needle; just wound it around and stuck it through.

Q. Did you have all that with you? A. No, we used to keep it in a corner in the wheelhouse.

Q. Were you making a general inspection of this cloth? A. Yes, I was looking to see what was to be done.

Q. How often do you do that? A. Whenever it is necessary, like we overlook it every trip. If it is necessary to do it, we do it, if any stop is worn out or the whipping is off.

Q. What is a stop? A. It is a piece of nine-thread line about so long (indicating); one end is shoved through the hole of the dodger, and you put in a splice into the dodger; on the other end we take a piece of twine with a needle and wind it around and put on the whipping.

Q. Where was this piece of twine? Was it at the bottom? A. No, on the end of the line.

Q. What part of the weather cloth was used? Was it the upper or the lower part of it? A. It was the upper part of it.

Q. How far was it from the end of the bridge? A. Well, from the end of the bridge I should think about eight or ten feet from the port side, where I put in a new stopper, and where I put the cloth was on the starboard side of the dodger and maybe one or two on the port side.

Q. The whipping was on the starboard side? A. Yes.

Q. And the stopper was on the port side about eight or ten feet from the end of the bridge? A. Yes, about so; I would not say to a foot.

Q. Was anybody on the bridge when you were doing this work? A. I suppose there was some-

body around, but nobody that I noticed; that is, I can't describe anybody.

Q. You testified here something about using the stairway going from the saloon deck to the bridge?

A. Yes, from the saloon deck to the bridge.

Q. And some objection that was interposed by the steward. You did not tell me when this occurred. A. The first trip I was on the *Allianca*.

Q. How long were you on her? A. I think I joined her the 16th of May, 1920.

Q. That was about sixteen or seventeen months before this accident? A. Well, no; about six or seven months—

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Q. It was in the spring of the year before? A. Yes, it was the end of May or the beginning of June.

Q. Where did that occur? At what point? A. Around one of the Haitian ports; it was around Haiti.

Q. Who was the steward at that time? A. I don't remember his name, now.

Q. Did you report that to any of the officers? A. No, I did not have a chance to tell any officer right there and then, so afterwards I couldn't say anything about it because I didn't think it was nice for me to run around to the mate and tell him things like that, so I didn't say anything about it.

Q. Didn't you ever use the stairway at any subsequent time? A. Well, after the steward told me not to use it I used it very little while passengers were around; that is, if I didn't have anything to carry; if I was dressed up in clean clothes, I used to go through there, but if my working clothes were on I didn't go up that way; I used to go up on the ladder.

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Q. Don't you know that the officer gave instructions that when carrying heavy objects or in rough

weather, you could use those steps? A. Well, I didn't speak to the officers about that personally, myself, at all. He didn't tell me to use it or not use it, or anything like that; that is, myself.

Q. Mr. Johnson himself states upon the stand that your mate had given instructions to use the stairway in stormy weather or rough weather. A. So I understood; but I didn't happen to speak about that object at all to any of the mates, because I used the stairway as little as possible while the passengers were on board, after the steward had told me not to.

Q. Sometimes you would use it, though? A. Sometimes I would use it, yes; but if I had anything to carry or was in my working clothes I would go over the ladder if it was not too bad weather.

Q. When would you use it, use the stairway? A. When the ship was in port and when there was no passenger on board; I always used it then.

Q. When you are at sea? A. I would use it at night time, after ten o'clock until about before seven in the morning, before the passengers were around.

Q. Isn't this (indicating) a kind of a passageway with doors on the port and starboard side, etc.? A. Yes.

Q. And behind that, separated by a partition and in front of it are the saloon parlors for passengers and the dining room? A. Yes.

Q. You are familiar with the fact that there were also on other parts of the ship two ladders leading from the saloon deck to the boat deck or the bridge deck, abaft of the beam, toward the rear portion of the ship? A. Well, there were some ladders up; there was a ladder up there going up to the passengers' smoking room and the ladies' parlors.

The Court: The question was whether there was a ladder going up to the bridge deck.

The Witness: There was a ladder going on the boat deck, yes.

By Mr. Rogers.

Q. Weren't there two, one on each side of the ship? A. No, there were not two. I think there was one on either side; yes, there were two, one on each side going up, on the boat deck.

Redirect examination by Mr. Artell. 284

Q. Do you have any general instructions from your officers, or did you have to make minor repairs to gear and equipment as A. B. or quartermaster? A. Well, our officers used to tell us, and of course we had all been going to sea long enough to understand what was to be done of little repairs.

Q. Well, is it customary for quartermasters or able seamen to know their business and to make minor repairs such as fixing frayed-out lines and replacing chafed or broken ones; did they do it without special instructions? A. It is customary to some ships.

Q. Was the dodger still up the next day when you were in port and when you fixed it? A. It was not exactly up; it was up in the ends, but the middle was let down, because Nelson was working around there. 285

Q. And you could see the lines? A. Yes.

Q. As you were working there, and you saw that one was broken? A. Yes, I saw that one was broken.

Q. Was it a new or an old line that was broken, could you tell? A. It was not exactly brand new,

- 286 *William Michelson—For Plaintiff—Redirect.*
 William R. Dalton—For Plaintiff—Direct.
-

but it didn't look to be a rotten one. It was a worn line.

WILLIAM R. DALTON, being duly sworn and examined as a witness for the plaintiff, testifies:

By Mr. Artell.

Q. What is your business? A. I am a seaman.

Q. Any particular part of the sea trade? A. Chief steward.

287 Q. How long have you been going to sea? A. Twenty-two years.

Q. You were born where? A. In the State of Wisconsin.

Q. Have you ever acted as chief steward of any passenger vessel? A. Yes, several.

Q. Which ones? A. The Roanoke, the Yukon, of the Pacific Steamship Company; and the Great Northern was the last passenger boat that I was chief steward on, 14,000 tons, and we carried a thousand passengers until the Titanic wreck, and then we would get down to 800, and I had 135 men in the stewards' department.

288 Q. What proportion of the crew has the average merchant ship carrying passengers got in the stewards' department? A. Oh, I should say a third or more; yes, there are nearly half.

Q. It depends on the ship? A. Yes.

Q. If a vessel is navigating in trans-Atlantic trade carrying a lot of steerage passengers, do they carry more stewards than anything else? A. Yes.

Q. But a little coasting vessel that carries freight and passengers, both, it is a different matter? A. Yes.

William R. Dalton—For Plaintiff—Direct.
Charles J. Ward—For Plaintiff—Direct.

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Q. Are the quarters occupied or used by passengers for sleeping purposes, lounge, smoking, dining, etc.—

Objected to as irrelevant.

The Court: It seems to me the plaintiff's testimony was to the effect that both steward and mate acted in his matters and that the steward told him not to go through the passengers' quarters, and that the other commanding officer told him to go up the ladder.

Mr. Axtell: Yes, that is right.

The Court: It does not seem at this time 290
 important to go on with this.

Mr. Axtell: Then I will not make the record any longer.

(The witness is withdrawn.)

CHARLES J. WARD, being duly sworn and examined as a witness for the plaintiff, testifies:

By Mr. Axtell.

Q. You were first officer of the Allianca at the time of this accident? A. I was.

Q. You have been brought here by the defendant company? A. Yes, sir. 291

Q. You are still in their employ? A. I am still in their employ, yes.

Q. Will you tell me how many passengers you had on board the steamer Allianca at the time of this accident? A. I couldn't verify the exact number, but I believe we had about sixty.

Q. At times you had as high as 125 passengers, did you not? A. We had accommodations for 125, yes.

The Court: That does not answer the question, and was not responsive. Counsel says at times during this voyage did you have as many as 125 passengers.

The Witness: That I can't say, if we had that many.

Q. You were pretty near full at times, were you not? A. Yes.

Q. What is your total crew complement? A. Ninety-six men.

Q. How many in the deck department? A. Twenty-two.

293 Q. That includes officers, seamen and ordinary seamen? A. Yes, and carpenters, etc.

Q. How many in the engine room department? A. About thirty-five.

Q. That includes the water tenders, the firemen, oilers and all? A. Yes.

Q. And the balance are stewards? A. Yes.

Q. And you have a chief steward and an assistant steward? A. Yes, and second steward.

Q. They have the entire charge of the passengers in the stewards' department, to see to the comfort of the passengers? A. Yes, in regard to the berthing and eating.

294 Q. When a ship is at sea that carries passengers, everybody endeavors to please the passengers? A. Yes.

Q. It is the principal business of the ship? A. Yes, it is the principal business of the ship.

Q. What time did you have dinner on the Allianza for the passengers? A. We had meals, we had one seating—we have breakfast at eight o'clock, dinner at one, or at least lunch at one, and dinner at half-past five. Sometimes they vary the hours, according to one or two eatings.

Q. Five-thirty till what hour? A. Till half-past six.

Q. During the meal hours and after the meal hours the passengers usually distribute themselves about the lounging places of the ship? A. Yes.

Q. They have a smoking room? A. Yes, they have a smoking room.

Q. And a bar? A. They have no bar now on this ship.

Q. Well, there is a parlor for the passengers in the forward end just aft of the bridge? A. Right abaft of the saloon, forward of the companionway.

Q. And the quartermasters, to go to the bridge and up this stairway, have to go right through this parlor, don't they? A. No, sir.

296

Q. I show you Exhibit 3. Is this the door that they go in (indicating)? A. That is a door leading into the saloon.

Q. That is the passengers' saloon? A. Yes, that is the passengers' saloon.

Q. That is what I was thinking about. A. Well, that is not the doorway.

Q. Well, all right. That door is never used by any of the crew; that is only used for the passengers. There is a door further aft that is used for the crew when they go up on the bridge.

Cross-examined by Mr. Rogers.

297

Q. Then this diagram does not indicate the door used by members of the crew when they go in to use the stairway? A. No, it is not on that diagram.

Q. Where is that door located where they go in? A. That door is about twenty feet further aft than that lobby door is; that is the lobby door.

Mr. Axtell: I have called an unfriendly witness, and I think the cross-examination

*Charles J. Ward—For Plaintiff—Cross.
Motion to Dismiss.*

should be limited to those facts which I particularly questioned him about. If counsel goes into the question of other doors and one on another deck, that is his affair; not mine. I have a right to controvert it by our testimony.

The Court: Proceed.

Q. A quartermaster going in through the door of which you speak, going up the steps, will he go through the ladies' parlor? A. No, sir, he would go through that door I have just referred to, the door I told him to use to go to the companionway up the stairs. It is only about a ten-foot passageway outside of the deck house into the interior.

Mr. Rogers: I do not want to cross-examine on my case, and he may step aside.

PLAINTIFF RESTS.

Mr. Rogers: I move to dismiss the complaint upon the grounds that:

First, there is no evidence of unseaworthiness;

Second, that it is obvious from the plaintiff's testimony that he assumed the risk in climbing the emergency stairs or a ladder; and

Third, on the ground that it was his own fault to rest his weight upon the insecure weather cloth;

Fourth, upon the ground that there is no evidence of negligence elsewhere; and

Again upon the ground that even if there were evidence of negligence it cannot be

Motion to Dismiss.

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Charles J. Ward—For Defendant—Direct.

made the basis of a recovery in this case in an admiralty court.

Motion denied.

Defendant excepts.

TESTIMONY FOR THE DEFENDANT.

CHARLES J. WARD, recalled for the defendant, testifies:

By Mr. Rogers.

302

Q. What position did you occupy upon the *Allianca* at the time of this accident? A. I was chief officer of the ship.

Q. How long have you been chief officer of the ship? A. I have been chief officer of that ship since February, 1920.

Q. What experience had you had as a licensed officer prior to the time you went on the *Allianca*? A. Four years' experience.

Q. On what ships? A. On the steamship *Colon*, the steamship *Advance*, the steamship *Allianca*, the steamship *General Hodges*.

Q. How long have you been at sea? A. Seventeen years.

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Q. In what various capacities have you been at sea? A. As quartermaster, boatswain, seaman, third officer, or third mate, second mate, and chief mate.

Q. About four years ago you stood your examination for officer's license? A. Five years.

Q. You then were third mate? A. I was third mate.

Q. And so on up? A. Yes.

Q. What instructions, if any, did you give the quartermasters or the steward with respect to using the stairway leading from the saloon deck to the bridge deck, by the quartermasters? A. I gave the quartermasters instructions at any time they were carrying anything in their hands not to come over the forward ladder but to use the companionway abaft the bridge, leading from the saloon deck to the bridge deck; back of my room, which is at the head of the stairway, is a box or chest where we keep lead lines and deep sea lead, etc. We also keep hand leads in the pilot house for emergency, to go out and take soundings. To my knowledge they have been doing that on and off; that is, right along. One time one of the men told me that the chief steward objected to him using the stairway.

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Q. When was that? A. That was on the first voyage I was there.

Q. That was in February? A. About three or four weeks after I joined the ship.

Q. That was about six or seven months before the accident? A. Yes, about six or seven months before the accident.

Q. Go ahead. A. I said, "I will see the chief steward and give him instructions to allow you men to come up that companionway." I told the chief steward with reference to that, and he said he would allow them to pass after that. He said they had been using the stairway right along.

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Q. Did you tell that to the steward in charge of the Allianca at the time Johnson was injured? A. Yes, I told that to two stewards that were there; one previous.

Q. Did you receive any complaints thereafter from any quartermaster or any of the crew, that the steward had declined to allow the stairway to

be used? A. There was no complaint made to me, no, sir.

Q. You say, to your knowledge, that the various quartermasters did use this stairway? A. Yes, sir.

Q. Did you ever see Johnson on the stairway? A. I never met him on it, but I saw him come up and go down that way several times.

Q. I show you a paper and ask you—it purports to be a blue print of the deck plan of the steamship *Allianca*, and ask if that correctly represents the size of the ship and the plan of the various decks?

Mr. Axtell: Objected to unless the date of making of the blue prints and the ship are put in evidence. 308

Mr. Rogers: I am talking about the present time.

Mr. Axtell: I object farther on the ground that we should have proof that the construction of the ship has not been altered since this blue print was made.

Objection overruled. Exception.

Mr. Axtell: I object further on the ground that this witness is not qualified; he is a deck officer of shore experience and is not qualified in any way to read a blue print. There is a construction man of the Panama Railroad in this court room; why not call him? 309

Q. I asked you whether this blue print which I show you correctly represents the general plan of the various decks of the *Allianca* at the present time? A. It represents the decks, yes, sir.

Q. How many methods are there of going from the saloon deck to the deck above it, or the boat deck? A. There are four ways.

Q. What are the four ways? A. One on the bridge, on the forward part, that ladder; the emer-

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Charles J. Ward—For Defendant—Direct.

gency ladder, and there are two emergency ladders about amidships, one on each side——

Mr. Axtell: Did the question ask for the method of reaching the bridge or boat deck?

Mr. Rogers: The boat deck.

Mr. Axtell: Objected to as incompetent and irrelevant; the boat deck has nothing to do with this.

The Court: I will overrule the objection. Exception.

311

Q. I will change it in order to make it a little more specific. How many ways are there for going from the saloon deck to the bridge? A. Four ways; by using the four ladders, one on each side of the deck house; the boat deck and the bridge is one flush deck; they are connected.

Q. That is, the bridge and the boat deck? A. The bridge and the boat deck are all on one smooth deck.

Q. Referring to this blue print or diagram, you will observe some red lines. Do these red lines indicate the location of the ladders on the sides of the ship? A. They indicate the location aft leading from the saloon deck to the boat deck; which is also the bridge deck.

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Q. Will you take a pencil and indicate with the letters A and B upon the diagram of the saloon deck the location of the two ladders, one on each side, to which you have referred? (The witness does so.)

Mr. Rogers: I offer in evidence the diagram.

(It is marked Defendant's Exhibit A.)

Q. You have referred to two ladders which you have indicated upon this blue print of the vessel as A and B. Will you please describe the construction of those ladders? A. They are made of pipe, the same as the forward ladder; and they go from the boat deck up about two feet over the deck house, or over the deck of the boat deck, with an elbow curved right down on to the deck, which gives you a safe hold until you are well up on the deck.

Q. The difference between those ladders and the emergency ladders on the front of the bridge is that those ladders are looped up over the deck and are bent down to the floor of the deck holds and the emergency ladder didn't come quite to the top of the hand rail of the bridge? A. Yes.

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Q. Have you observed a good many vessels and the construction of the emergency ladders upon the front of the bridge? A. I haven't seen any emergency ladders, but I have noticed the construction of ladders leading to the bridges and abaft the bridges, with those curves.

Q. What is the difference between the construction of the ladders abaft the bridge and in front of the bridge? A. Abaft the bridge it does not interfere with the navigation of the vessel, such as taking bearings on different lights or land marks. On the forward part of the bridge it would. Also, if there was anything there it would obstruct the vision by having anything reflected in your eyes, or if you are taking a bearing on any object, this hand rail might be in your way while you were taking the bearing. In order to get your distance off from any object ashore you would have to wait until it got out of your vision.

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Q. Was this emergency ladder on the front of the bridge of such a form as you have seen hereto-

316 *C. J. Ward—For Defendant—Direct—Cross.*

fore in use? A. I haven't noticed them on any other ships; no.

Q. What kind of ladders have you noticed on other ships? A. I have not seen many ships constructed like the Allianca in regard to ladders. They mostly have ladders leading abaft the bridge; but the bridge would be just a narrow wing on each side, and they would have that pipe railing leading way up with a bend, secured to the deck.

Q. Have you seen any ladders where it lapped over, as you have described with reference to the two side ladders? A. No; not on the forward part of the ship.

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Cross-examined by Mr. Axtell.

Q. What would you estimate was the length from the bridge to the after end of the boat deck; the distance? A. That would be as far as the No. 3 hatch.

Q. What is the distance of the midship deck there, the navigating bridge and boat deck and all? A. I would not be accurate, but I guess about 175 feet.

Q. You have never been an officer except in the employ of the Panama Railroad Company? A. I have been an officer in the employ of the St. Clair Oil Company.

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Q. But you say you have been employed on the General Hodges of the Panama Railroad? A. Yes.

Q. And the Allianca, Advance and Colon; and they are all Panama boats? A. Yes.

Q. Where is the chief steward? A. The chief steward that was on that ship at that time is on the Cristobal now; chief steward.

Q. Is he in the court room? A. No, sir.

Redirect examination by Mr. Rogers.

Q. What time did you leave the bridge on the day of the accident? A. About a quarter of eight.

Q. In the evening? A. Yes, sir.

Q. What was the position of the dodger at the time, or the weather cloth? A. It was triced on to the rail.

Q. That is, it was nailed down over the rail? A. It was on the outside of the rail.

Q. On the rod which runs along on the outside of the bulwark— A. Right outside of the bridge.

Q. That was in the center? A. Yes.

320

Q. Where were you proceeding at the time of the accident? A. We were going from the port of Guayaquil down the Guayaquil River, which is six or seven miles long, and proceeding to Manta, Ecuador.

Q. Had you passed out of the Guayaquil River at 9.10 that evening? A. No, sir.

Q. What time did you leave the river and go clear outside, into the sea? A. I don't quite remember now what time it was.

Q. Is this the log of the Allianca? A. Yes, sir.

Q. After examining the entries on the log would you be able to refresh your recollection as to the time when you left the river? A. I believe I could; yes, sir.

321

Q. Turn to the log of October 7th, at 9.20, and tell me what was the time when you got outside of the river. A. About 9.45 or 9.47.

Q. What is the log entry? A. 9.47 had Santa Clara abeam.

Q. What was the state of the weather as indicated by the log on that occasion? A. The weather was cloudy, with a moderate breeze and moderate beam sea.

322 *C. J. Ward—For Defendant—Redirect—Recross.*

Q. What motion was there on the ship at the time? A. There was no motion at all that I remember.

Q. This weather cloth that you have spoken of, what was the condition of the weather cloth? A. The weather cloth was in good condition.

Q. Did you give any instructions to Mr. Erickson, the quartermaster, to do any work upon the weather cloth? A. No, sir.

323 Q. What are the rules and regulations on your ship with respect to work of that sort being done by the quartermasters? A. The quartermasters come under the jurisdiction of the chief officer; he lays out all work for them and they perform the work that he puts out; they have got to do the work that he lays out.

Q. Do they do any other work? A. They might obey the orders of the first engineer and the third officer.

Q. Do they do repair work except under the instructions of the officers of the ship? A. In an emergency they would; if a line or a halliard or a shroud was carried away they would be called to do the work; but that is generally left to the seamen.

324 Q. Did you give any instructions with respect to any repairs being done upon the weather cloth? A. No, sir.

Q. Was there anything about it that required repairs to be done upon it? A. Not at that time; no, sir.

Recross-examination by Mr. Artell.

Q. It is your duty as first officer, amongst other things, to look after the details of repair to gear belonging to the ship? A. Yes.

Q. And you cause an inspection to be made once in a while, or make one yourself, of all the running gear of the ship? A. I do; yes.

Q. That includes the dodger? A. Yes, that includes the dodger.

Q. If you see anything out of order you would tell one of the men to fix it? A. Yes.

Q. You were a quartermaster and seaman before you became an officer? A. Yes.

Q. And you made repairs under the instructions of other officers, before? A. Yes.

Q. Did you ever make any repairs that you were not told to do to minor gear and equipment? A. No, sir; when I got orders to do anything, unless it was a small thing, that you would not wait for an order.

326

Q. If you went on the bridge and you observed a broken nine-thread line attached to a dodger, would you wait for the first officer to tell you to fix it, or would you go to that little box and get out line and fix it, yourself, without orders? A. I would go and tell the chief officer.

Q. You would not fix it, first? A. If he wanted me to fix that dodger—

Q. Suppose he wasn't there; would you go back to the after end of the ship and ask him if you should go and fix this little guard? A. No, sir, I would do it then; but I would tell him about it when I had done it.

327

Q. You would be sure to report that you had fixed it? A. Yes, that I had done the work.

Q. Yes; to get credit for it. You were not asked any questions about this arrival at one place between here and the south where there is an adequate hospital; Baiboa; and that you arrived there and discharged passengers and cargo but did not transfer this suffering seaman. Why was that?

A. Well, we had passengers for Buenaventura, and those passengers were all sent in a boat ashore; and in order to move Johnson it would have been more injury and pain to him to handle him that way.

Q. In other words, it was to save him pain that you didn't take him off when you got into Balboa the first time?

Mr. Rogers: We were talking about two different places.

Q. I am talking about Balboa now. That was where he was put in the hospital, eventually? A. Yes.

Q. But you stopped at Balboa and then went on to Cristobal and landed him there and sent him by rail to Balboa, from which port you had just proceeded the day before? A. Yes.

Q. Why didn't you put him in the hospital when you got to Balboa first, instead of keeping him on board the ship for twenty-four hours, or longer?

A. That was up to the medical people that examined him, whether it was safe to take him up there or not.

Q. Do you mean to say that as first officer of the vessel, having supervision over the chief steward, that a little thing like a doctor, would interfere with your sway? A. He didn't interfere with my sway, no, sir.

Q. He would have gone ashore if you had ordered him ashore? A. No, sir; I didn't have that supervision.

Q. Where is the captain? A. He is not here. He has gone on one of the other steamers going to the west coast.

Q. He knew about this man, didn't he? A. Yes.

Q. And the company know where he has been for the last six or seven months, don't they? A. I don't know.

Q. You knew? A. I know where he was about a month ago.

Q. You could have told them if they had wanted to get his testimony. A. I didn't hear of him directly; I heard from people who had seen him.

Q. Is it a fact that the gangway was so steep that you couldn't get Johnson up? A. Yes; it was low at that time.

Q. Is it a fact that he was told it was too steep to get him off the ship and they couldn't get him up the gangway without hurting him, and had to keep him on until the next day when the tide would be higher? A. At that time it was too steep and we didn't want to delay the ship there.

332

Q. You have got lots of cargo hoisters on board the ship? A. Yes.

Q. And you know how to rig up a hoister and put a man ashore? A. We couldn't do that without delay, and he was comfortable where he was.

Q. He was well enough off, so you left him there? A. He was there in the doctor's care.

Q. He couldn't get out of his bunk. A. The doctor has charge.

Q. You have got a hospital on the ship, haven't you? A. No.

333

Q. You have got a room that you call a hospital, with the name over it, called Hospital? A. No, sir.

Q. You have a place where the doctor keeps his patients when they are sick, haven't you? A. No; we treat them in their room.

Q. You know that the laws of the United States require a hospital and a doctor for a ship carrying over fifty passengers? A. He had just as good ac-

- 334 *Charles J. Ward—For Defendant—Recross.*
Lucien A. Skeels—For Defendant—Direct.
-

commodations as if he had been in a hospital at the time.

Q. How long did you stop at Balboa? A. About two hours.

Q. And you discharged cargo? A. We discharged cargo.

Q. And you discharged passengers? A. Yes.

Q. And then you hove up the anchor and sailed away? A. We didn't heave up the anchor; she was tide to the dock.

Q. Well, you threw off the lines? A. Yes.

- 335 *By Mr. Rogers.*

Q. You were not on the bridge, and know nothing about the actual accident to Johnson, do you?
 A. No, sir.

LUCIEN A. SKEELS, being duly sworn, and examined as a witness for the defendant, testifies:

By Mr. Rogers.

Q. What is your business? A. I am a mariner.

Q. What license do you hold? A. Second officer's license.

- 336 Q. How long have you been at sea? A. Since 1912; nine years.

Q. What has been your experience? A. I have had experience on all kinds of vessels, from coal barges to schooners, steamers, battleships, tugboats; all classes of vessels.

Q. Passenger ships? A. Passenger ships also.

Q. How long have you been an officer? A. I have been an officer since July 9th, 1919.

Q. On what ships have you served as officer? A. The Allianca, General Hodges, General Gorgas; that is about all, sir.

Q. Were you upon the Allianca at the time that the quartermaster, Johnson, received his injuries? A. I was.

Q. Where were you at that time? A. I was on the bridge.

Q. What time did you go upon the bridge? A. At a quarter to eight.

Q. Your watch was from a quarter of eight until what hour? A. Midnight.

Q. What do you know with respect to this accident; what do you know about the accident to Johnson? A. Johnson at that time was taking soundings, when I went on watch. We were away from Punta Arena which is at the entrance to the Guayas River; we had left there and were bound down the bay; Johnson was taking soundings, and we had sufficient water so that at the time I told him—which was twenty minutes past eight—that he need not take any more soundings; to bring the lead up and knock off. I didn't designate any way to come up on to the bridge; just told him to knock off. He could take either means of one or two passageways to come to the bridge.

Objected to as irresponsible.

Objection overruled. Exception.

Q. Go ahead. A. Johnson, in coming up, chose to come up with the ladder on the bridge and coming up he fell. Immediately after he fell—or I heard the fall when I was on the port wing of the bridge, and looked over and saw him lying on the deck, so I went over. I had Captain Scully relieve me at first, and went over to Johnson. Johnson was lying on the deck, in pain, lying on the lead

line. I asked him how he fell, and he didn't know how he fell. I called the night watchman to get the chief steward to get some blankets, because Johnson told me he was shivering and cold at the time. They brought up the blankets and brought a pillow and covered him over. The doctor came immediately, right after the chief steward and gave him what attention was possible there, and fixed him up with the blankets and carried him aft and took him down below in his quarters.

Q. When you heard him fall you say you went immediately over the bridge? A. I did, sir.

Q. How did you get down? Over the emergency ladder? A. Over the emergency ladder, on the forward part of the bridge.

Q. What was the condition of the weather cloth or dodger at that time? A. The weather cloth was triced on over the rail, leaving a smooth surface over the rail.

Q. You climbed right over and went on down the ladder? A. Yes.

Q. Opposite the ladder on the bridge is there not a little step? A. Yes.

Q. You spoke of some ways by which Johnson could have taken the lead to the locker. A. Yes.

Q. What were those ways? A. First, he could have come up the way he did attempt to, on the forward part of the bridge over the bridge ladder; and second, he could have come on either side of the deck, port or starboard, coming through a passageway up the companionway, and at the head of the companionway there is a box where the lead lines and log lines and other gear are kept. That was the way he usually came up and put the lead lines or the log lines in the box at the end of every voyage. Then there is a way on the port side that is right aft of a door leading down to the firemen's quarters.

That leads on to the boat deck. On the port side he could come up a similar ladder that leads on to the boat deck and has a clear passage walking forward either way; only when there is tackle stretched out for the lifeboat and gear of the boat we have to step over. But it has been used regularly by another quartermaster for several voyages; he never went any other way, to my knowledge.

Q. What other quartermaster was that?

Objected to.

Q. Some quartermaster working on the *Allianca*?

A. Yes. That was at the time of the accident, and it was used before that by this quartermaster. He used to make it a regular rule of coming up over that ladder and coming along the boat deck in preference to going over the bridge by the emergency ladder, or down the companionway.

Q. Was that Nelson? A. That was Nelson.

Q. I will ask you to look at this blue print, Exhibit A, and note the marks A and B upon it. Are these marks A and B the location of the two side ladders? A. Yes, sir.

(The blue print is handed to the jury.)

Q. Will you indicate upon this diagram approximately the location of the chest in which the lead and line were kept? (The witness indicates with the letter L.)

Q. Now, I have traced over your lines in ink the letter L. Is that the approximate location? A. That is the exact location.

Q. At the head of the companionway steps? A. Yes.

Q. Did you have any conversation with Johnson after you told him to bring up the line; any further conversation? A. No, sir.

Q. Did he state to you at that time that he had gone to the companionway and the steward had turned him back? A. No, sir.

Q. What do you know, during the time of your service upon the ship of the use of the companionway by Johnson in carrying the lead? A. Johnson was one of the quartermasters that used the companionway continuously. I very seldom saw him going up the ladder forward of the bridge. Nelson used the side ladder that came down from the boat deck. Michelson chose either way to go. If he chose to go over the bridge he would go that way when he was relieved from doing work. Otherwise he went down the ladders, and sometimes he went down the side ladders.

Q. What was the difference between this emergency ladder in front of the bridge and the side ladders? A. The side ladders that led to the boat deck have an extended rail that comes up in a curved shape of a gooseneck that comes out and is fastened to the top tread, whereas the bridge ladder has none.

Q. What is the reason for the difference in construction? A. The ladder forward of the bridge in reality needs to be constructed that way in order to give a clear view so as not to have any obstructions when you are on watch; the forward part of the bridge needs to be clear.

Q. You say that the ladder in front of the bridge needs to be constructed that way. What do you mean? A. So that it did not extend up above the bridge. It needed to be fastened below the rail, as it was fastened.

Q. Have you seen that form of ladder on other ships? A. I have.

Q. On how many? A. I have seen it on two ships.

Q. What were they? A. The U. S. S. Wil-

helmina, formerly the *Wilhelmina* of the Matson Navigation Company of San Francisco.

Q. Have you seen ladders with the gooseneck arrangement in front of the bridge? A. I never have.

Q. You spoke of two ships and mentioned one. A. The other is the U. S. S. *Achilles*; the third is *El Cid*, formerly the U. S. S. *Housatonic*.

Q. Was the construction with ladders in front of the bridge— A. No, sir; the ladder on the *Housatonic* was on the after gun. That was the Morgan Line.

Q. The gooseneck arrangement is applied where the ladder reaches from the rear of the bridge, and not in front of the bridge? A. Yes.

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Cross-examined by Mr. Artell.

Q. Have you also been in the navy? A. Yes.

Q. How much of your time in the nine years that would include coal barges and schooners has been spent on board battleships? A. I have been eighteen months in the United States Navy.

Q. That is all? A. That is all.

Q. How much in coal barges? A. I have spent one year with coal barges.

Q. How much in schooners? A. In schooners somewhere around six months.

Q. Any brigs or barkentines? A. No, sir; fore and aft schooners.

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Q. You have not been in anything else? A. Tugboats.

Q. How much in tugboats? A. Well, that I wouldn't exactly state. I have been on tugboats on and off, at intervals.

Q. In what capacities? A. As seaman.

Q. Deckhand? A. Deckhand and seaman.

Q. They don't take deckhands on tugboats as seamen, do they? A. They do.

Q. Was it on a navy tug? A. No, sir. I have been on navy tugs.

Q. You say that little pipe showing would interfere with the vision of the officer on the bridge, if it extended over the top of the bridge? A. It would.

Q. And that was the reason they didn't put it on the *Allianca*? A. I don't know for what reason they didn't put it there, but I know it would interfere with the vision of an officer on the bridge.

Q. What is the age of the *Allianca*? A. Thirty-two or thirty-four years.

Q. The ladder has been there ever since she was built? A. I would not state that.

Q. It has every appearance of it. A. Appearances are hard to tell, at times.

Q. It is a good, permanent ladder? A. Yes.

Q. What is the dodger? A. The dodger is to protect the officer on watch or lookouts on watch who may happen to be on the bridge, from the elements.

Q. Have you got any isinglass holes to look through? A. No; but at each end of the bridge we have a shelter, with glass windows.

Q. That interferes with the vision a little bit, doesn't it? A. What interferes with the vision?

Q. The dodger, when it is up? A. No, sir.

Q. But the ladder would? A. Yes, sir.

Q. You had nothing to do with advising the doctor to keep the plaintiff on board the ship? A. I had nothing to do with the medical attendance on board the ship.

Q. They do have men laid up and sick quite frequently on board ship? A. Well, not in accident cases; but in sickness, occasionally there is a man sick.

Q. It is quite common? A. Yes.

Q. Especially in the tropics? A. Yes.

L. A. Skeels—For Defendant—Cross—Redirect. 355

Q. And they always keep them on board ship till they get to a home port? A. It just depends on the seriousness of the case.

Q. If you put a man ashore in a hospital you have got to go and arrange with the consul or the authorities, for his maintenance? A. That is a simple matter, costing the man nothing at all.

Q. You know it is their policy to keep them aboard the ship till they get to the home port, and then put them in with the lost baggage or with the rest of the cargo? A. I know nothing of the kind.

Redirect examination by Mr. Rogers. 356

Q. You say the dodger was not stretched across the front of the bridge coming down the Guayaquil River? A. No, sir.

Q. Why was that? A. At the time we left Guayaquil we had a pilot on board and he stayed on board for somewhere around four hours; all that time the dodger was down. It had to be down, fixed, for him to have a clear view piloting the ship down the river.

Q. There was no such rough weather as would require the use of the dodger at that time? A. No, sir.

By the Court. 357

Q. At the time of this accident were you in quiet water in the river, or were you out in the sea? A. We were in the waters of the harbor; the entrance of Guayaquil River at Punta Arenas; where the man was injured was about two hours' sailing from there. But it was all still water; there was no action of the sea whatsoever.

JAMES W. FLYNN, being duly sworn and examined as a witness for the defendant, testifies:

By Mr. Rogers.

Q. Were you the physician on board the *Alliance* at the time that Johnson was hurt? A. Yes, sir.

Q. What medical experience have you had; how many years and where? A. Since 1876.

Q. In what connection? A. With general practice.

Q. Surgical and otherwise? A. General practice.

359 Q. Are you a graduate of any college? A. Bellevue Hospital.

Q. How long have you been on the *Alliance*? A. Two years.

Q. What do you know about Johnson's injuries?

360 A. I was called about half-past eight one night to see him and found him on deck suffering from shock, and he complained of great pain and seemed to be in great pain. He was yelling at a great rate. I asked him how he had received his injury and he said he was going up a ladder and slipped and fell and struck the deck. So I examined him at the time and it was so painful that I had to take him down to his bunk. So I left him there and had to give him something to brace him up. So I brought him down to his bunk and there I fixed him up for the time being, and he complained of so much pain that he couldn't move the thigh or the leg. So I concluded that there was some injury to the hip joint. I kept him as quiet as I could and every two days I measured the length from the hip joint down to his ankle and compared it with the other side and at that time it was possibly a quarter of an inch shorter, so I concluded it was an impacted fracture. That is, the fracture was like as if you

take a stick between your two hands and squeeze it together. It is not broken off, but just jammed in. So the treatment was, the principal thing was rest.

Q. What else did you do? A. Rest.

Q. Any applications? A. I gave him some hot applications right over his hip.

Q. Was the condition that you found one that could be treated upon the ship by surgical methods?

A. No, sir, there were no real accommodations aboard.

Q. Were there any accommodations along the line from the place where it occurred up to the Isthmus? A. No.

362

Q. What are those places? A. They are—you would not care to go ashore yourself in some of the places. There is nothing of any kind.

Q. Was there any place where they had an adequate hospital service? A. Not that I know of.

Q. Have you been ashore at all those places? A. No, sir, I didn't go ashore.

Q. Did he request to be put ashore anywhere along the line until you got to the Isthmus? A. Not that I recollect.

Q. What happened when you got to the Isthmus of Panama? A. When we got to Balboa we found that we couldn't get off the boat.

Q. Why? A. The water was so low and the angle of the ladder going up we couldn't get—it was a risk for anybody to go up the ladder, and then we decided to bring him to Cristobal, and the hospital is at Colon. We docked at Cristobal and from there we took an ambulance to Colon, to the Colon Hospital.

363

Q. Why was he then returned from Colon to Balboa? A. I suppose they had more accommodations at Balboa than they had at Colon. It is really a

364 *J. W. Flynn—For Defendant—Direct—Cross.*

reception hospital, and from there, if they are going to be a long case, they are transferred to Ancon.

Q. Are you familiar with the character of the hospitals upon the Isthmus? A. Well, in a general way. They are maintained by first class surgeons, and such as that.

Q. They are under the superintendence and direction of the United States Government? A. I presume so.

Q. You don't know about that? A. I don't know about that positively.

365 *Cross-examined by Mr. Artell.*

Q. Did you put any splints on this man's leg? A. No, sir, I did not.

Q. As matter of fact, you didn't know his leg was broken? A. Well, I suspected that it was, in the hip; I told Mr. Johnson at the time that the trouble was in the hip joint.

Q. If you had thought it was broken, you would have taken some method of making sure that the bones did not get out of adjustment, would you not? A. If you put splints on, especially to fit, down the leg, it would not be the right treatment. You would not want to draw out the bone.

366 Q. As matter of fact, you had no X-ray on the boat? A. No.

Q. And you would not know how to operate it if you did have it? A. Well, I knew what to do while I was there.

Q. You suspected there was a fracture? A. Yes.

Q. You couldn't tell what kind of a fracture? A. Yes. I suspected it was an impacted fracture.

Q. You have seen the hospital record in this case since? A. No, sir.

Q. Well, it has been reported to you, has it not? A. Yes.

Q. Were you in the court room yesterday when the X-ray doctor testified? A. No, sir.

Q. Were you informed as to what he did testify? A. No.

Q. Who did give you your information as to the nature of the injury in this case? A. When I was down at Cristobal I 'phoned over to that hospital.

Q. And they told you that it was an impacted fracture? A. Yes.

Q. Then your suspicions were confirmed? A. Yes, then my suspicions were confirmed.

Q. You have been practising medicine for a long time? A. Yes.

Q. Forty-five years? A. Yes.

Q. It is a long time. A. Yes.

Q. Do you sign on as a member of the crew? A. Yes.

Q. Would you mind telling me what your compensation arrangement is with the company? A. Well, is that necessary?

The Court: I do not see the materiality of that.

Q. Well, what I wanted to find out is this: not exactly what you receive, but do you receive so much a month from the company for your services? A. Yes.

Q. And you also receive some compensation from the passengers whom you treat during the trips? A. Very seldom.

Q. That is, if it is given to you it is in the way of a voluntary payment? A. I don't object to it.

Q. You don't object to having a little extra compensation? A. No, sir.

Q. But you are merely required to do all that is required for the attendance on passengers or crew, without any fees or extra charges? A. Yes.

370 *James W. Flynn—For Defendant—Redirect.*
C. J. Ward—For Defendant—Recalled—Cross.

Redirect examination by Mr. Rogers.

Q. You said you asked him how he received his fall, and he stated what? A. He stated that he was going up the ladder and in some way fell from the ladder to the deck.

Q. Was that all he said? A. Well, that is about the sum and substance of it; he said in some way he fell from the ladder and struck the deck; and besides, that he was carrying the lead that he used for sounding.

371 Q. Did he talk over how he received this accident, later on, when you treated him, or did you ask him?

Mr. Axtell: That, we do not think permissible.

A. No, I didn't ask him.

The Court: Well, he didn't ask him.

Mr. Axtell: May I recall Mr. Ward?

The Court: You may.

372 CHARLES J. WARD, recalled for further cross-examination:

By Mr. Artell.

Q. You wrote this log (handing witness log)?

A. Yes, sir.

Q. Do you remember Zila Marillo, a female passenger, who deserted the ship by jumping into the customs guard boat? A. Yes.

Q. Was that the same day as the date of this accident? A. Yes, sir; it was on our way going down the river.

Q. Was that on October 7th? A. It was on our way going down the river; I think it was October 7th.

Q. Was it later on, the same day, that Johnson fell from the ladder? A. It was that same evening.

Q. Why didn't you make a record of this accident to a member of the crew? A. There was no word given to me till the next morning, and when I spoke to the captain about it he said he had made out his own log with regard to that thing and there would be no room in the log.

Q. You look in the logbook and see if you can find any entry of any date about this accident?

A. No; there is no entry about it.

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Mr. Axtell: I offer in evidence the log.

The Court: You have the negative fact, coupled with the logbook, that there is no record of this accident. There is no use in cumbering the whole record.

Mr. Axtell: I offer the dates covering October 7th and 8th record, 1920.

Q. There is a current out of this river, isn't there? A. Yes.

Q. It is quite a large river? A. Yes; sixty-seven miles long.

Q. What is its width? A. In some places it may be a mile wide and in some places about six or seven hundred fathoms wide.

375

Q. It is navigable for a distance of sixty miles, with your boat? A. Yes.

Q. You draw how much? A. We drew twenty-two feet of water.

Q. Isn't it true that wherever there is a current that hits the sea, there is a choppiness? A. If it hits the sea outside there may be; but a current running in one direction, or if the volume of water

376 *C. J. Ward—For Defendant—Recalled—Cross.*

runs the one way, there is no choppiness unless there is wind.

Q. It depends on how the wind is? A. Yes.

Q. What direction was the wind there at that time, blowing? A. It was SW to 8 o'clock, and then W to midnight.

Q. Do you recall how that river opens into the bay? A. Almost from north to south.

Q. Then the wind was on the starboard beam? A. Yes, on the starboard beam coming south.

Q. Isn't it a fact that where your stream enters into the ocean you get a ground swell? A. Yes, sir.

377

Q. On practically all rivers you can always calculate on a ground swell somewhere near the shore, outside where you are going to enter? A. Yes, sir; so there is no shelter like the land; the land protects the water from the wind.

Q. The length of the ship was about 336 feet, wasn't it? A. At some places.

Q. And about forty-two feet beam? A. Oh, the ship? Yes; about forty or forty-two feet.

Q. And twenty-two feet draft? She was a small vessel, wasn't she? A. Well, she is a 3,000-ton ship.

Q. How is that compared to the ships that are running in the harbor? She was one of the old, little ships? A. She is not so little; a 246-foot ship is pretty big.

Q. How many minutes after you left these twenty minutes after four, and this accident occurred? A. Well, she was still in the river; she was going about three miles with the current, and was going toward the shore about fifteen miles.

Q. In any minute how far would you proceed? A. About eight miles.

Q. You don't know where you were when the accident occurred, do you? A. No; I couldn't say definitely.

Q. And you undertake to tell this jury that you were in quiet water, but you don't know where the ship was? A. We were in quiet water; yes, sir.

Q. You don't know where the accident occurred? A. I was told the next morning where it occurred; but I knew at the time we were in quiet water.

Q. The dodger is put up whenever the spray is coming over? A. Yes.

Q. And whenever the wind blows hard enough to make it necessary? A. Yes.

Q. Does your log indicate the Beaufort scale? A. Yes, sir, in the front part. 380

Q. What breeze do you estimate was blowing when you went off watch that night? A. About thirteen to fifteen miles an hour.

Q. What would it be on the Beaufort scale? A. It would be about four.

Q. That is, calculating the speed of the ship as well as the wind? A. Well, you know the direction of the wind; you don't calculate the speed of the ship with the wind unless the wind was going in the same direction as the ship and the smoke was going up straight.

Q. You would get the wind on your starboard bow? A. Starboard beam; starboard bow; starboard side of the ship. 381

Q. The wind came over like this (illustrating)? A. Yes.

Q. You say the breeze was four? A. About four.

Q. Don't you know that four is a moderate breeze and that you get that breeze when your ship is proceeding at four to six knots whether there is any breeze or not? A. You get it no matter what the breeze is.

382 C. J. Ward—*For Defendant—Recalled—Cross—Redirect.*

William K. Potts—*For Defendant—Direct.*

Q. Four to six knots when there is no wind?
A. No, sir; it says four, moderate breeze.

Q. Four to six knots; doesn't it say that? A. That is when a ship is going four to six knots and the wind blows at moderate strength.

Redirect examination by Mr. Rogers.

383 Q. What does the log show with reference to the breeze at that time? A. We have got moderate; at 8 o'clock it was three; that was around the time of the accident. The wind blew up a little after we got outside of the river.

Q. At the time of the accident it was three? A. At the time of the accident it was three.

Q. And there are twelve divisions in the Beaufort scale? A. Yes.

Q. Running from an imperceptible light breeze up to what? A. From calm up to a hurricane.

WILLIAM K. POTTS, being duly sworn and examined as a witness for the defendant, testifies:

384 *By Mr. Rogers.*

Q. What is your profession? A. Consulting engineer; marine.

Q. A marine engineer? A. Marine.

Q. How long have you been in that business? A. Well, twenty-five years.

Q. During that time have you had an opportunity to observe the construction of many passenger ships and other vessels? A. I worked as an apprentice in naval construction at William Cramp

& Sons from the time I left college until I came to New York seven years ago as official consulting engineer with the Panama Railroad.

Q. How many ships did you examine in that time, approximately? A. I should say probably a hundred.

Q. Have you observed the construction of the emergency ladder in front of the bridge upon the Allianca? A. Yes.

Q. Was that the usual and regular type of ladder such as is found on ships in similar locations upon vessels? A. Exactly.

Q. What is the custom as to not wrapping a ladder of that sort over the bridge rail? A. In the first place the location and the design of ladders for emergency, or otherwise, is designated by the steamboat inspection service, and we intend in every case to comply with their wishes as to the proper operation of the ship, and with the owners. Those ladders are usually put so as to not interfere with anything in the operation of the ship. In this case they would interfere with the taking of bearings. The cloth is usually up.

386

Q. In the event that it was carried over the bridge rail it would interfere with the taking of bearings? A. Yes. The dodger is always left down in taking bearings. It is put up in stormy or bad weather; but necessarily the ladder could not be taken down. The dodger is kept up usually going down out of the harbor, and such places where you get lights or landmarks.

387

Q. You spoke of steamboat inspections. Perhaps the jury is not familiar with that. What is that? A. It is a series of inspections that every steamship of the United States commercial department is put under every year; the survey require-

388 *W. K. Potts—For Defendant—Direct—Cross.*

ments that they are compelled to comply with for the safety of the vessel and its crew and passengers.

Q. And if the appliances on a vessel for the use of crew or passengers do not come up to their standard they have authority to require it changed?

A. They certainly do; and there is no come-back about it. We always comply with their requests.

Q. Would they pass on such questions as this ladder, in the inspection of the ship? A. Yes, sir; the law requires two modes of egress, and they must comply with the designs of the steamboat inspection service.

389 Q. In this case had the Allianca passed the steamboat inspection? A. Every year.

Cross-examined by Mr. Artell.

Q. Isn't it a fact that the law passed with regard to new construction on ships, the regulations, are that the requirements relate only to new ships that are built subsequent to the regulations? Isn't that true? A. Not in this particular case. The rule governing the——

390 Q. You have answered the question. You are not going to be permitted to make any speeches while I am examining you. There are not any particular regulations as to ladders on a bridge, are there? A. That is entirely up to the local inspectors.

Q. Can you give me a regulation with regard to the bridge of any ships, of the Allianca; can you point to it? A. There is no law that governs any specific place. It does say "ladders" (indicating).

Q. You have looked through those regulations to find something, and you didn't find it. A. Is that so? I have looked through them a good many times.

Q. And you looked through for this case? A. No, indeed I didn't; but suppose I did?

Q. You know that the United States Government has made absolutely inadequate provision for the inspection of steam vessels? A. I would not care to pass judgment.

Q. You are not afraid to say that two men in the great port of New York, the greatest in this world, passing upon the qualifications of all the ships that go to sea from this port, at salaries of three to four thousand dollars a year—that that is inadequate provision? A. I have been asked by some of the ship builders to try to make suggestions whereby the operators and builders could better comply with the requirements, as required—

Q. And one of those requirements—

Mr. Rogers: Requirements by whom?

Q. All the steamboat inspection service amounts to is this: the inspection of your boilers once in so often, to see whether they will stand a pressure of 200 or 220 pounds. A. You don't know anything about an inspection. It all depends on what a boat is supposed to carry.

Q. Well, they put down for an adequate test of that particular boiler. A. What that boiler is built for; the United States lines.

Q. And then they look over the hull and they say she won't sink; and they sign a certificate, and she goes to sea. A. I would not care to criticize such a—

Q. You don't want the jury to think that the United States Government or the local steamboat inspectors relieve you from looking after your ladders, do you? A. They do, to a certain extent.

Q. Are you a navigator? A. No, sir.

Q. Did you ever study navigation? A. I did not.

Q. You know enough about it to know that you take observations from one of the heavenly bodies or from some fixed object on the land. A. I do.

Q. And you know that those observations are taken from the top of the bridge, where there is no rail to interfere, aren't they? A. If they have standard compasses up there.

Q. Unless the officers are too lazy to go up there? A. No; they may be taken from the pilot house; from the deck compass.

Q. Just show the jury how absurd this argument about the ladder interfering with vision is, by telling me the purpose of the stanchion on this bridge (Exhibit 1). What is the purpose of the stanchion? A. That print is not sufficient. I can't see where it is.

Q. You have been on the bridge of the *Allianca*? A. Yes.

Q. And there are several pipe stanchions of the same size as the ladder across the bridge, are there not? A. I don't know.

Q. (Producing another photograph to witness.) You can't identify this as a photograph of the bridge of the *Allianca*? A. No, I couldn't say that that was the *Allianca*.

Q. This is in evidence and has been proved to have been taken, and here is Mr. Woods right in it. You know him, don't you? A. Yes.

Q. Are you satisfied that that is a picture of the *Allianca's* bridge? A. I presume it is.

Q. Do you see a pipe stanchion there? A. I see something that looks like a stanchion.

Q. Can you tell me whether that and the ladder are approximately the same size? A. Yes; a little smaller—

Q. How much does that pipe interfere with vision on the bridge? Two inches, doesn't it? A. That stanchion is considerably to port or starboard of the center line of the ship.

Q. So is the ladder, isn't it? A. Oh, no; the ladder is just off the center line.

Q. Have another look. Here is Exhibit 6, drawn to scale, showing the ladder. It is a pretty good picture of the ladder and of the bridge? A. The two stanchions coming up there would entirely obliterate any view.

Q. Are these two port holes in the bridge through which the quartermaster at the wheel looks? A. The dodger cloth is very misleading.

398

Q. Well, the dodger cloth can be seen over by the quartermaster at the wheel? A. Yes; but that is not drawn correctly. It should not cut the port light like that.

Q. The port light is too low? A. Yes; the dodger is tapered down to give a clear view to the port light, when it is up even.

Q. There is a little wooden platform back of the wheel on which the quartermaster stands when he steers, and it raises him up high enough so that he can see over the dodger? A. Well, he couldn't.

Q. Well, he can. You have steered a ship? A. No.

Q. Have you been to sea? A. Yes.

399

Q. You have been out on trial trips? A. Yes.

Q. And you never took hold of the wheel? A. No.

Q. And you never stood back of the quartermaster to see how the compass worked? A. Oh, yes.

Q. Then you know that it is perfectly absurd to argue that that ladder on the port quarter opposite the corner of the wheelhouse would in any way interfere with vision. A. I maintain it would.

Q. With whose vision? A. The quartermaster's.

Q. The man at the wheel? A. Yes.

Q. What has he got to do with the navigation?

A. Well, the second officer is directly back of him and gives instructions.

Q. It would interfere with observations? A. Yes.

Q. Why don't you confess that you don't know what you are talking about when you said that—

A. You are just trying to confuse me. I am not an operator; I have told you that; but I do know something about the construction of ships.

Q. You were asked why was that ladder not brought up and you said it would interfere with the navigator's vision. A. Yes.

Q. And there are the officers of the ship (indicating), and then you made the statement that it would interfere with the quartermaster also. A. In making the adjustment after the steering is done outside.

Q. Are you talking about aligning up your compass after you get to sea? Have you ever seen that? A. No.

Q. You mean the presence of this sail would interfere with the accuracy of the compass? A. No.

Q. If it were there and you had the lodestone or the north pole and they had a sufficient amount of steel opposite the compass they could true it up, could they not? A. No.

Q. Well, assume that the ladder was there, as far as the accuracy of the compass is concerned, it could be adjusted? A. It would be usable, yes, sir.

Q. In other words, no compass, put on a steel ship with a big engine and boilers aft and the various gear that goes with it, is true without being adjusted? A. That is so, yes.

William K. Potts—For Defendant—Cross.
Lucien A. Skeels—For Defendant—Recalled.

403

Mr. Rogers: I will read in evidence the cross-examination of Robert Nelson, whose testimony was taken on behalf of the plaintiff at the office of Silas B. Axtell, No. 9 State Street, New York City, on August 21, 1921, in the case of Andrew Johnson against the Panama Railroad Company.

Mr. Axtell: I join in the offer and will read the direct if you wish, and you can read the cross.

Mr. Axtell reads direct testimony and Mr. Rogers the cross-examination of the witness Robert Nelson, to the jury.

404

Adjourned for recess till 2 P. M.

Met pursuant to adjournment at 2 P. M., present as before.

Mr. Rogers: I have just a word of explanation that I wish to have made about one of the exhibits.

LUCIEN A. SKEELS recalled.

By Mr. Rogers.

Q. I show you Plaintiff's Exhibit 6 and ask you to observe the manner in which the dodger or weather cloth is represented upon this exhibit, and I will ask you whether that represents the position of the weather cloth at the time of the accident? A. No; the way he has it described here it gives the impression that it does not give a clear view from the port holes; when it does. It is made on a bias, beginning at this stanchion (indicating), coming down below the port holes, so that the quar-

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406

Lucien A. Skeels—For Defendant—Recalled.
Andrew Johnson—Plaintiff—Recalled.

termaster at the wheel has a clear view of the horizon beyond.

Q. That is the position of the dodger when it is up? A. Yes.

Q. At the time of the accident it was how? A. It was lashed down over the rail, so that it didn't extend above the rail at all.

Q. Was it ever stretched across the ship, or used at any time in the manner represented upon this map? A. Never.

DEFENDANT RESTS.

408

TESTIMONY IN REBUTTAL:

ANDREW JOHNSON recalled in rebuttal.

By Mr. Artell.

Q. The testimony of Mr. Nelson was read into the record here, and he said at page 15 as follows: Did you hear it? A. No, I didn't hear it.

Q. Well, I will read it to you: "Q. Did you hear Johnson say anything about how he was hurt? A. He told me he reached for the step and there was no step and he didn't get hold of it, and he fell.

407 Q. Reached out for a step and didn't find it? A. He went for the last step and grabbed for a step and didn't get hold of it. Q. That is what he told you? A. Yes. Q. When did he tell you that, after he fell down? A. Some time after. Q. It must have been after he fell, because he couldn't tell you before. A. It was on the ship after he was lying in bed there. Q. Well, he didn't say he was standing on the last rung of the ladder? A. No, he was not standing with his feet on the last rung. Q.

Did he tell you where he was standing? A. No; but he told me he reached for another step. He thought there was another step. Q. But he didn't tell you where his feet were? A. No; he didn't tell me." Did you have any such conversation with Mr. Nelson?

Objected to as an effort to contradict his own witness.

The Court: The witness Nelson was called by the plaintiff. Objection sustained.

Mr. Axtell: This testimony was offered by the defendant.

Mr. Rogers: I offered it as cross-examination of this witness. When you would not read the testimony of Nelson I offered to read the cross-examination. 410

The Court: Objection sustained.

Exception.

Mr. Axtell: I urge further on this ground: that not only did Mr. Rogers offer this testimony in court as part of his testimony and his case, because I had not read it as part of my direct, but in addition the matter related to was not touched upon in the direct examination of this witness, and therefore it is new matter upon which we have a right to be heard in rebuttal.

411

Objection sustained. Exception.

Q. Mr. Johnson, at the time you went into this place to go up the companionway to the bridge—the quick way or the near way, and the safe way—what was the chief steward doing when you saw him? A. He was standing in the doorway talking to one of the lady passengers.

Q. What did he say? A. He told me not to walk in that way with that wet line; that there were passengers inside.

Objected to as not rebuttal.

The Court: It is not rebuttal; but it may stand, because there was no objection.

Q. The testimony of some of the witnesses seems to indicate that you could have gone aft to one of the other ladders which had proper hand rails on the sides of them, and could have climbed up that way and proceeded across the boat deck to the bridge, and then deposited your lead. What do you say about that? A. You could do it, but in a dark night there was never nobody used those ladders except to go up to the boat deck to the lifeboats in case of danger; and in the day time the ladders were never used except an officer sent somebody up to fix something in a lifeboat, and no quartermaster ever used them, and no quartermaster was ever told by any officer to use those ladders when he was going to the bridge.

Q. How far is it from these ladders aft, up to the bridge? A. I couldn't say how far it is; but—

Q. What is there up there? A. It is tackle stretched right across the deck from the davits; and the davits are lowered out and in by those tackles. They lower the boats out and in; pull them out and in with those davits.

Q. Gear with the blocks and tackle extending from the top of the davits clear to the opposite side of the ship? A. It hooks right on to the davit, and you pull the davit in when you pull the lifeboat in and the lifeboats are hanging in the tackle.

Q. How many are there up there? A. There are three lifeboats and two davits to each lifeboat.

Q. Would you have to pass over these to get forward? A. You would have to pass over these to get forward, and besides there are some boxes there where you coil up the falls on that you lower down the lifeboats in, several boxes and a ventilator up there, and in the dark in the night there would be more danger for a man to go up there and walk over that way up to the bridge than the other way.

Q. You also have to pass the funnel? A. You also have to pass the funnel and the smokestack.

Q. And the skylight to the engine room? A. Yes.

Q. Is there any way provided to walk from the boat deck to the bridge on that deck; is there any open way where a man can walk in a straight line, without tripping over something?

416

Objected to.

Objection overruled. Exception.

A. No, sir.

Q. What is there on the after end of the boat deck? A. On the after end of the boat deck is the ladies' parlor and music room combined together.

Q. Are there windows in that room? A. Yes.

Q. Were there any regulations when you were there with regard to the crew hanging around that part of the ship? A. No, sir; no crew was allowed to hang around there except he had orders from the officer to do some work there.

417

Q. Who promulgated those rules; who made those rules? Who gave you instructions? A. Well, the chief officer gave us all instructions.

No cross-examination.

PLAINTIFF RESTS.

TESTIMONY IN SUR-REBUTTAL:

418 *C. J. Ward—For Deft.—Recalled—Direct—Cross.*

CHARLES J. WARD recalled in sur-rebuttal.

By Mr. Rogers.

Q. With reference to the boat deck and the use of the ladders, in finding a way from below to the bridge, what was in the way there? A. Those tackles that were made fast to the davits, but they came right down to the deck.

Q. Is there a clear space? A. There is a clear space about two feet; where the tackles are made fast to eye bolts in the deck there is about two feet space that they can go along.

419 Q. Is that deck used from time to time by members of the crew? A. Yes.

Q. Is there any regulation against the use of it by members of the crew? A. No, sir.

Cross examined by Mr. Artell.

Q. Here is a chart; the same as you had on the ship, isn't it? A. Yes, sir.

Q. Can you trace your course from where you started? A. Here is Guayaquil; which is a city. That was where we were at anchor; from our anchorage we take a course right down the river, which is practically south, down this way (indicating); of course, we have to change the course more or less—— (The witness draws a course from Guayaquil down the river in coming to the pilot station at Puna.) After we dropped the pilot we proceeded on our course right straight down the river.

Q. Where is point Santa Clara? A. It is right here (indicating).

Q. Just mark that, please, with a cross. (The witness does so.)

C. J. Ward—For Defendant—Recalled—Cross.

421

Q. You stated that at 9.47—where was Santa Clara from the ship then? (The witness indicates.)

A. She was abeam of Santa Clara.

Q. Which way was she headed? A. She was beginning to head up southwest.

Q. You were going southwest? A. Yes.

Q. At this point (indicating) when you say you were abeam of Santa Clara, at latitude S 65 W, will you draw a line from Santa Clara to your course, showing what her line abeam is? Where did you get by Santa Clara? A. We came the north side.

Q. Is this your course (indicating)? A. Well, that is not our practical course.

422

Q. Well, will you mark the course? Show us about where you were going. You had changed your course? A. Well, this line should have been up further, here (indicating); we were coming about that way (indicating); and then we changed our course from there.

Q. The second mark, beginning at a sounding mark of twenty-four fathoms indicates the correct course? A. Yes.

Q. Proceeding up toward the Santa Clara light and thence turning to starboard. Where were you at 8.10 or 8.15? A. Somewhere about here (indicating).

423

Mr. Rogers: At 7.55 S 65 W at that point; 9.47 Santa Clara abeam; distant 10 miles.

Q. At what time were you at Espanola Point?

A. 6.22. (The witness indicates with a cross.)

Q. That (indicating is where you were at 7.55?

A. Yes.

Q. Then you proceeded at the same rate of speed up past Santa Clara? A. Yes.

424 *C. J. Ward—For Defendant—Recalled—Cross.*

Q. And this accident happened between this point "A" and this point, Santa Clara?

Mr. Rogers: It happened about there.
(The witness indicates.)

A. We had been changing courses right along there. We had been working right around, you see.

Q. That shows that your course was approximately west from the time that you passed this point "A" at Selina Point from Espanola Point; until you got to Santa Clara your course was almost due west? A. Yes, almost due west.

425 Q. You testified a little while ago, and what did you say your course was? Do you recall? A. I said we had several courses.

Q. The wind was in the west, wasn't it? A. The wind was in the west, yes.

Q. Therefore you were heading into a sea, weren't you? A. That was before 8 o'clock; the wind was SW; at 12 o'clock the wind was W.

Mr. Axtell: I offer in evidence the chart.
(It is marked Plaintiff's Exhibit 10.)

426 Q. I show you statute 4290, U. S. Revised Statutes, and call your attention to Section 5 of the same, and ask you if you are familiar with it. Read it, please. A. (reading) "Every case of illness or injury happening to any member of the crew, with nature thereof, and medical treatment."

Q. Must be entered in the log. A. It doesn't state that here.

Q. What does it state in the beginning of the statute? A. "Official log." That is kept by the purser of the ship; and that is not the official logbook.

The Court: This is not a suit for failure to make log entries.

*C. J. Ward—For Defendant—Recalled—Cross.
Motion to Dismiss.*

427

Mr. Axtell: No: it is just to show the general incompetency of this crew.

Mr. Axtell: I offer in evidence this statute.

The Court: The Court takes judicial notice of the laws of the United States.

Mr. Rogers: I renew my motions: I move to dismiss the complaint upon the grounds that:

First, there is no evidence of unseaworthiness;

Second, that it is obvious from the plaintiff's testimony that he assumed the risk of climbing the emergency stairs or ladder; and

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Third, on the ground that it was his own fault to rest his weight upon the insecure weather cloth;

Fourth, upon the ground that there is no evidence of negligence elsewhere; and

Again upon the ground that even if there were evidence of negligence it cannot be made the basis of a recovery in this case in an admiralty court.

Motions denied.

Defendant excepts.

The Court: I shall follow the wording of the statute as I see it, and will give the full extent of right and remedy that you have under the Railroad Act. I will overrule the motion and will allow an exception to the defendant.

429

TESTIMONY CLOSED.

Counsel summed up the case.

Adjourned till to-morrow, January 11, 1922, at 10.30 A. M.

430

Charge to the Jury.

Brooklyn, January 11, 1922.

WOODBROUGH, J. :

Gentlemen of the jury, the regulation of relations between American owners of ships engaged in international commerce and their employees and seamen, is a matter purely within the power and authority of the Congress of the United States, because this international commerce affects the country as a whole, and so we look to the laws of the United States as enacted by Congress to find the law applicable to this case.

431

It is provided in the Act of Congress governing here in very simple, easily understood, language, it seems to me, that any seaman who shall suffer personal injury in the course of his employment may maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply. That is to say, after the passage of that act of Congress the seamen employed on American vessels in international commerce shall have the right to maintain an action for damages at law for their injuries, with a trial by jury; and shall have the rights and remedies that have been accorded heretofore by Congress to railway employees.

432

Now we turn to see what the rights and remedies that have been accorded to railway employees in personal injury cases are. The Act of Congress says that every common carrier by railroad while engaged in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, etc., shall be liable in damages to any person suffering in-

juries while he is employed by such carrier in said commerce, for such injury resulting—that means such injury as results in whole or in part from the negligence of any of the officers, agents or employees of such carrier—from the negligence of any agent or employee of the railway company—or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, boats, wharves, or other equipment. That is to say, that where, through the negligence of a railroad company, or as explained by this statute, where, through the negligence of a ship owner, a company employed in international commerce, an employee suffers as a direct and proximate result of such negligence, through any negligence of an officer or agent or employee of the ship owner, or by reason of any defect or insufficiency in its appliances or boats or equipment, he will be entitled to recover damages according to the rules of law that are established.

434

In this case the plaintiff bases his claim against this defendant company upon those laws of the United States and he claims that through the negligence of the defendant company one of its appliances on its steamship *Allianca* where he was employed, was so insufficient and defective, and its officers who were directing the course of the work (including the work of the plaintiff) were so negligent in giving them orders as to where and how the work should be done, that, as a direct and proximate result he suffered his injuries.

435

More particularly he claims, sets out in his pleading and attempts to show here by evidence, that the ladder on this ship *Allianca* leading from the forward well deck to the bridge of the ship was insufficient. He does not say defective in the sense that it was broken, or loose; but that it was insufficient, and not reasonable and safely adapted to the

use to which it was being put, by reason, as he claims, of the top part of the ladder not being brought up to the bridge in such a way as to afford a sufficient hand rail for a sailor climbing up the ladder with something in his hand or on his shoulder, like a lead line, such as he was carrying in this case; in that at the top it was not sufficiently provided with means for continuing his upward progress and proceeding safely on to the bridge.

437

In his bill of particulars he sets that out in this language. He says that the ladder was short and was not properly equipped with adequate hand holds or grips available at this point, meaning at the top of the ladder. He says that by reason of the dodger, referred to in the evidence, being stretched to a point both below and above the top of the rail on the bridge, the means of access to the bridge was insufficient within the meaning of the statute, and was not reasonably safe for his use, and he claims that this condition resulted from negligence of the defendant. He claims that by reason of that insufficiency he suffered his injury.

He further claims that the officer from whom he had to take his orders in the matter directed him to use this particular ladder at the time that he was using it, and that that order was negligence, and contributed to his injury.

438

Those are his claims. Now, the word "negligence," as it is used in this law, simply means the doing or omitting to do something which a reasonably prudent person in the conduct of his own affairs under all existing circumstances would not do or would not omit to do, in the exercise of ordinary prudence and care.

The defendant denies these claims of the plaintiff, generally; denies that there was any insufficiency or defect in the means of access, the ladder,

and the position of the dodger, and the general condition as to means of access to the bridge from the forward well deck. It is denied that the plaintiff had either been ordered or directed to use that particular ladder. It claims that there were several means of access to the bridge open to him, which the defendant says he ought to have used, and which were safer than the one he did use.

The defendant further claims that he either ought not to have used this particular ladder when he was encumbered with the leadline, or if he did use it that he should have used care, which his knowledge of the ladder and its condition required, in order to safely mount in that way, and that the plaintiff himself was negligent in the way he did undertake to get up on to the bridge.

440

The defendant further claims that that accident and the injury occurred entirely by reason of the negligence of the plaintiff himself, his own carelessness; and not through any negligence on the part of the company; and those are the issues to be determined by you.

The burden of proof is on the plaintiff, and he cannot recover unless he proves to you all of the substantial allegations, material elements of his claims as I have outlined them, by a fair preponderance of the evidence. By which I mean not a proof beyond a reasonable doubt, as in a criminal case; but by evidence which on the whole case more nearly convinces you of its truth than the evidence opposed thereto. If the testimony in your opinion, a fair preponderance of it, shows that this falling from the ladder was the direct and proximate result of the claimed negligence of the defendant, substantially as charged and claimed by the plaintiff, then he would be entitled to recover damages. Otherwise he would not. The burden of proof is not upon the defendant to show affirmatively that

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the accident occurred in some other way, or in the way that its pleading sets up it did occur; but the burden is on the plaintiff to make out his case before he is entitled to recover damages.

If the plaintiff is entitled to recover damages under the law as I have outlined it to you, then he would be entitled to recover such an amount of money as would be present compensation, full and adequate, but fair; not by way of punishing anybody; but merely by way of compensation for whatever of pain and suffering he has endured and for whatever pain and suffering you can foresee with reasonable certainty he will endure in the future. For whatever loss of time and earnings he has endured as a direct result of this accident or injury in the past, and such as can be fairly and reasonably foreseen in the future, having regard to the vicissitudes of life generally, having regard to such earnings as he told you he was capable of making and did make, and having regard to his age and those things which are shown here in the evidence which bear directly upon the accident and the loss occasioned by the injury.

If it should appear to you, gentlemen, from consideration of the evidence, that the plaintiff was himself negligent, that is, that he did not do all that a prudent man under all of the existing conditions would do, but was himself guilty of some degree of carelessness or negligence, he is not on that account to be entirely debarred from recovery.

Another provision of the act of Congress is this: "In all actions brought against a steamship company engaged in international commerce, by a seaman, for personal injuries, the fact that the employe (that is, that the plaintiff in this case) may have been guilty of contributory negligence (that is, some negligence on his own part which had to do

with and caused in part his injury) shall not bar a recovery; but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe."

So that if it should appear to you that there were these other methods of getting up on to the bridge available to him, that he knew the risk of the particular ladder that he did use, that ordinary prudence and care required him to go to these other places or use these other means (if you find there were other means and that they were available), or if you find, as indeed you must find here on his own statement, that he ought not to have thrown as much of his weight as he did throw upon this canvas in getting over, and that that was carelessness on his part, and not made necessary by the conditions under which he was mounting the ladder, if it was some carelessness on his part, to some or any degree, or if any other matters show you that the man was himself guilty of some contributory negligence, then you must apply the provision of that law. If it appears to you that his own negligence and lack of care were the real cause of his injury, and that these other conditions were not such defects as claimed, and were not the cause or contributing causes of his injury, then he would not be entitled to recover at all.

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The law further provides in any action brought under this law to recover damages for injuries an employe shall not be held to have assumed the risks of his employment in any case where the violation by the employer of the statute enacted for the safety of employes contributed to the injury of the employe. That is to say, he assumes such ordinary risks of his job or employment as are known to him, or that he becomes familiar with, and that you conclude he must become familiar with in the ordinary course of the employment; except that he

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does not assume the risk that results from carelessness on the part of his superior, or for negligence, from defects or insufficiency of the appliances and equipment that are provided for carrying on his work.

I will inquire from plaintiff whether there are some further matters that I should elaborate.

Mr. Axtell: I think your Honor's charge has been a very substantial contribution to our law on the subject.

The Court: The main inquiry is whether I shall go further.

449 Mr. Axtell: I believe that we should have a special verdict from this jury. The maritime law—

The Court: Pardon the interruption. I have considered, gentlemen, the claim of the plaintiff as to his medical treatment, and the evidence satisfies me that, under the law applicable to that situation, the master of the ship, having provided him with care from the doctor, and having brought him down to his berth in the ship, having then thereafter conveyed him to a hospital, and the general course of his treatment—I do not find that under the law there has been any violation of the law or the requirements of admiralty or maritime usage or custom in regard to his medical treatment, and I therefore so instruct you as to that claim of the plaintiff; that there can be no recovery on that ground, on that character of claim.

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Plaintiff excepts.

Mr. Axtell: I request your Honor to charge the jury to bring in a special verdict stating whether or not they find that the unseaworthiness of the *Allianca* in respect to the ladder—unseaworthiness being considered a failure to furnish a reasonably safe appliance for the function needed, whether

they find that that ship was unseaworthy in that respect, and whether that has been considered by them as an element in bringing in their verdict as to damages, if they do bring one in.

The Court: The request will be denied for the reason that the Court has instructed and has based the rights of the plaintiff entirely upon the statutes.

Mr. Axtell: We bring our complaint and cause of action under the old maritime law, as it existed prior to the law of March 4, 1916, and prior to the Supreme Court decision (Osceola decision).

The Court: I understood your position, Mr. Rogers, was that this would not create a condition of unseaworthiness.

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Mr. Rogers: No; there is no evidence of unseaworthiness to submit to the jury. There is no basis for a special verdict apart from that. The case has to stand upon your Honor's construction of the statute as it applies.

The Court: Under the maritime law what was the measure of recovery for injuries resulting from unseaworthiness of the vessel?

Mr. Rogers: If unseaworthiness of the vessel is the direct and only cause of the injury then it can be on an indemnity basis. If the injuries are received as a result of any negligence on the part of the crew then he cannot recover at all.

The Court: You say that the maritime law is that if a ship is in any respect insufficient so as to make their employment more dangerous and hazardous and that as a result seamen suffer injury, that there is a liability on an indemnity basis?

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Mr. Axtell: I do, and I say that in this case the evidence is preponderating that the liability of vessels engaged in this trade carry ladders on their bridges where they have them for this purpose, which do extend over the top and furnish safe grip for a man getting over. I will ask your Honor also

to charge the jury that if Johnson had refused to perform that order they could have put him in irons on bread and water until his disobedience ceased.

The Court: He did not refuse. I will ask you to prepare a form of special verdict such as you say should be brought in.

Mr. Rogers: May I add this word: I understand the law to be in this case that he could not predicate negligence on one type of ladder rather than another. If a type of ladder had been installed on a ship which had passed inspection from time to time, and which had been used for many years, and the ladder itself should develop an obvious weakness, such as a loose rung, then you would have a case of an unseaworthy ladder and you could bring the knowledge of it home in a way to the owners of the ship, so that they should be responsible for the consequences. But I do not think this case presents any state of facts upon which could be submitted to the jury the question of unseaworthiness of the vessel based upon the type of ladder employed. If it goes to the jury upon that point it is bound to give a double aspect of the case and practically require two charges to the jury.

Mr. Axtell: Here is the special verdict that I should like the jury to pass upon. We find that the *Allianca* was unseaworthy in that the ladder which the plaintiff was required to use or did use was too short, had no hand rails or grips adjacent thereto, and because the ship was not in this respect built in accordance with maritime practice and custom.

The Court: The Court will decline to submit the special inquiry as requested. I state to the jury at this time, in addition to the instructions that I have given, that it appears clear to me—and when I say it appears clear to me, you will bear in mind the law as I read it—that you jurors are the ones

who have the responsibility as to the determination of the facts, and it is your decision and not mine that controls as to the facts. But it appears to me in my opinion, as one of the facts shown by the evidence in this case—my opinion, not binding upon you gentlemen—that the question whether the dodger or canvas was stretched as claimed by the plaintiff at the time of his injury, is a material question, material to the inquiry in determining just how the accident happened to him. It is claimed on the one hand that the dodger was not at that time spread. It is claimed on the other hand, by the plaintiff and the testimony on his behalf, that it actually was stretched at that time; and that being so stretched it extended above the rail of the bridge, where otherwise he would have taken his hand hold, and in fact that his fall happened at the time when he was reaching up over the dodger for the hand hold:

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That is one of the material inquiries for the jury. The law should be applied just as I have given it to you and as I have read it from the book, and I will allow an exception.

Mr. Axtell: I ask your Honor to charge the jury that it is part of our statutory law that a seaman at sea must obey orders, and that he is subject to a penalty and almost a bread and water punishment every fourth day if he does not obey.

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The Court: I refuse to charge as requested.

Plaintiff excepts.

Mr. Rogers: I except to the submission of the case to the jury under the act of 1920 on the theory that it is to be decided by the jury under the same proofs which apply in case of railroad operation.

I also except to that portion of the charge relating to the dodger, upon the ground that the use of the dodger was not in itself negligence; and that

there is no evidence that the dodger was in any respect improper or unseaworthy.

I will ask your Honor to charge the jury that if the plaintiff knew, as he should have known, the character of the ladder—assuming that the act does apply—and used it upon the bridge from time to time, then he assumed the risk of any accident which happened to him in using that ladder under the conditions.

The Court: Refused, with an exception to the defendant.

Mr. Rogers: I ask your Honor to charge the jury that the assumption of risk is an absolute defense.

The Court: Refused, with an exception to the defendant.

Mr. Axtell: I take it that the motion to direct a special verdict is a discretionary matter, and therefore in order to raise this question I ask your Honor to charge the jury that if they find that this accident was caused partly by the failure of the company to conform to the ordinary rules and practice in ship constructing in regard to this ladder, that the ship was not seaworthy in the respect that the ladder was not reasonably safe for the purpose for which it was used, that they may, under the general maritime law, base their verdict upon that fact.

The Court: Refused.

Plaintiff excepts.

The marshal is sworn and the jury retire at 11.30 A. M., and return at 12.30 with a request that some of the testimony be read to them.

The Court: I understand, Mr. Foreman, that you wish to have read to you the testimony as to where the lead and line were deposited. Is that the inquiry of the jury?

Charge.

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*Verdict.**Motion to Set Aside.*

Mr. Foreman: It is.

The Court: I have requested the court reporter to make a careful search and she has found the passage requested.

The Stenographer (reading from testimony):

"Q. Did you know where the lead was kept? A. Yes.

"Q. Where? A. Up in the wheelhouse in the locker up there; they were all there handy any time we wanted it, so that we could get our hands on it."

The Court: Those were the questions and answers put to the witness Johnson. You may be excused for further deliberation. 464

The jury retire at 12.40 and return at 2.50 with a verdict for the plaintiff, and assess the damages at \$10,000.

Mr. Rogers: I desire to make a motion for a new trial upon the ground that the verdict is contrary to the evidence and contrary to the law and excessive.

Motion denied. Exception.

The Court grants the defendant a stay of thirty days after the entry of judgment, and sixty days to make a case, and the term is extended, accordingly.

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**Deposition of Robert Nelson for
Plaintiff.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

ANDREW JOHNSON,
Plaintiff,

against

PANAMA RAILROAD COMPANY,
Defendant.

467

Testimony of ROBERT NELSON, taken on behalf of the plaintiff before ANNA KIEFER, a Notary Public at the office of SILAS B. AXTELL, #9 State Street, New York City, on Aug. 31st, 1921.

APPEARANCES:

SILAS B. AXTELL (Mr. Crick of counsel), Attorney for Plaintiff.

RICHARD REID ROGERS, Esq. (Mr. Woods of counsel), Attorney for Defendants.

468 Signing, certification and filing of minutes is hereby waived, same to be taxable as costs.

ROBERT NELSON, being duly sworn, deposes and testifies as follows:

Direct examination by Mr. Crick.

Q. Mr. Nelson, what is your occupation? A. Seaman.

Q. Are you at the present time signed on a ship?

A. No, sir.

Q. Do you expect to go to sea very shortly? A. Yes.

Q. Were you a seaman on the 8th day of October, 1920? A. Yes, sir.

Q. On what vessel? A. "Allianca."

Q. In what capacity? A. Quarter-master.

Q. How many trips had you made before the 8th day of October, 1920, on the "Allianca"? A. I think it was two trips I had made at the time.

Q. And was this the third trip? A. I think it was the third trip.

Q. Did you know a quarter-master on that ship by the name of Andrew Johnson? A. Yes, sir.

Q. How many quarter-masters were there on that ship? A. Three.

Q. What was the name of the third quarter-master? A. Michaelson.

Q. On the 8th day of October, 1920, what watch were you on? A. I was on the 8 to 12.

Q. P. M.? A. Yes.

Q. Whom did you relieve? A. I relieved Johnson, but not that night. I relieved the look-out man on Johnson's watch at that particular time, because Johnson was taking soundings. I relieved the look-out man.

Q. That was at 8 P. M.? A. Five minutes to eight when I took the wheel.

Q. So, you didn't see Johnson then when you relieved at 8 o'clock? A. No, sir.

Q. Not on that day? A. No, sir.

Q. Now, you were familiar with the navigating bridge? A. Yes.

Q. That is, the construction of it? A. Yes.

Q. And how far across the vessel did the navigating bridge extend? A. How far across?

Q. Yes? A. How many feet you mean?

Q. In respect to the vessel, how far across the vessel did the navigating bridge extend? A. You mean outside of the ship's side?

Q. I want you to tell us in respect to the vessel, in respect to the breadth of the vessel, how far did the navigating bridge extend? A. Right across the ship.

Q. The full width of the ship? A. Yes, full width.

Q. Do you know how that navigating bridge was constructed? A. Yes.

Q. Will you describe it? A. Well, just a narrow passageway on the fore part, and with windows on each side of the bridge, and awnings over the bridge.

Q. There is a part of the bridge that you know as the bulkhead? A. Yes, right on the fore part of the bridge where the ladder goes up.

Q. How is it built, of what material? A. The bulkhead was wood.

Q. About how high from the floor of the navigating bridge did that bulkhead rise or extend? A. About 4 feet I think.

Q. Now, you said something about a ladder, was there a ladder? A. Yes, there was a ladder leading from the deck up to the bridge from the fore part.

Q. What deck? A. From the saloon deck.

Q. What was that ladder made of? A. It was made of some kind of pipes, iron pipes.

Q. Was that ladder secured to the saloon deck? A. Yes.

Q. Was that secured to the bulkhead of the navigating bridge? A. Yes.

Q. In what manner was it secured to the saloon deck, and to the bulkhead of the navigating bridge?

A. It was secured by screws. The ladder was in a socket and screwed into the deck.

Q. Describe in what manner the ladder was placed in respect to the navigating bridge? A. It was straight up and down, perpendicular.

Q. About how long was that ladder? A. Well, it was about somewhere around $2\frac{1}{2}$ feet short.

By Mr. Woods: I object to the answer as not being responsive to the question.

Q. From the saloon deck up to the floor of the navigating bridge, how many feet do you think it was? A. Well, it was 7 feet.

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Q. About 7 feet did you say? A. Yes, something like that.

Q. And the length of that ladder was about how many feet? A. About 8 feet.

Q. You say the bulkhead of this navigating bridge was constructed of wood? A. Yes.

Q. Was there a railing or rail on the top of this bulkhead? A. Yes, there was a kind of rail, a wooden rail on top of that bulkhead.

Q. Anything above the railing? A. There was a dodger of canvas.

Q. What was the purpose of that dodger? A. For shielding the wind.

Q. About how high was the dodger above the railing of the navigating bridge? A. About 2 feet.

477

Q. Was it up on the night of the 8th of October, 1920, when you went on watch? A. Yes, it was up so you could climb over it.

Q. How far up the bulkhead of this navigating bridge did this ladder extend, measuring from the floor of the navigating bridge? A. Well, it must have been a couple of feet.

Q. How far from the top of the navigating bridge was the last round of this ladder? When I say top of the navigating bridge, I mean the rail.
A. It must have been $21\frac{1}{2}$ feet at least.

Q. Did you see the accident that is alleged to have happened to Johnson, on the night of October 8th, 1920? A. No, sir, I didn't see the accident.

Q. What did you hear if anything said by any of the officers after you went on watch at 8 P. M. on the night of October 8th, 1920, in reference to Johnson? Did you hear any order or command given him by any officer?

By Mr. Woods: I object to that question as being incompetent, immaterial and irrelevant.

A. Yes, sir.

Q. What was the order?

Same objection..

A. That was an order not to do any more sounding.

Q. Can you give the order in the words as used?

Same objection.

A. He said, "That will do with the lead, Johnson."
480

Q. Describe what you next heard said by Johnson or the officer.

Same objection.

A. By Johnson, I heard Johnson who answered. He said "Alright, sir."

Q. Then next what did you hear or see? A. I heard Johnson going up the ladder, and then I heard the fall and he screamed.

Q. Did you recognize the voice of Johnson?

By Mr. Woods: I do not object to anything about the accident, Mr. Crick.

By Mr. Crick: Well, that was just what I was leading up to.

A. Yes.

Q. What next? A. I heard the 3rd officer say that Johnson fell down.

Q. Did the 3rd officer do anything further? A. He ran right down. He was the first man down there.

Q. Did you see Johnson after this? A. Two hours after. 482

Q. Where did you see him? A. In his room in bed.

Cross-examination by Mr. Woods.

Q. You say this was on October 8th? A. I think it was on October 8th. I haven't got the date here. I have it in a book. I don't remember exactly unless I see my book. I carry a date book. I think it was somewhere around there.

Q. What time did you say you came on watch that night? A. Five minutes to eight.

Q. I believe you stated you didn't see Johnson climb up the ladder? A. I didn't see him. 483

Q. Did you go up to Johnson after he had fallen? A. Two hours after, when I had to leave my watch for coffee.

Q. He was in his room? A. Yes.

Q. How long had you been working on that ship? A. At the time he fell down?

Q. Yes, how long before? A. I came on there on the 9th of July, 1920.

Q. Was that ladder in regular use as far as you know? A. Yes, it was in regular use. The dodger was up high. We had to climb over.

By Mr. Woods: I move to strike out the last part of the answer as not being responsive to the question.

Q. About what time was it that you heard this fall? A. It must have been a couple minutes past eight.

Q. That was when you say you saw the dodger up? A. I saw it on the bridge on the front part.

485 Q. When was that? A. That was about five minutes to eight when I came up there.

Q. Didn't you notice it after the accident whether it was up or not? A. Yes, sir.

Q. Didn't you know if it was pulled down snug over the rail or any difficulty getting over at that time? A. The dodger was up at that time. It was straight up on each end, tied up at each end.

Q. No difficulty about stepping over it? A. Yes, you had to step over it to get over the bridge.

Q. Wouldn't it push right down with a push of the hand? A. Yes.

486 Q. You speak of the measurements of the ladder and the distance of the bulkhead above the deck, and the distance of the rail from the top round of the ladder. You are just guessing at these measurements? A. Well, I never took any measurements.

Q. How high did you say the rail was above the top rung of the ladder? A. Above the ladder, I thought it was about 2½ feet.

Q. Couldn't have been 2 feet could it? A. Two feet? No, more than two feet.

Q. Weren't there places in the end of the stanchions of the ladder which were between the top rung of the rail that a man could catch hold of?

A. Well, there was some times when it was dark, a man couldn't hardly see that ladder.

By Mr. Woods: I move to strike out the answer as not being responsive to the question.

Q. I will restate the question. Do you know where the ends of the stanchions or sides of the ladder were? A. Yes, I knew.

Q. Where was it? A. On the bridge right on the fore-part. 488

Q. Have you any idea how far they were from the top rung of the ladder? A. It must have been about $2\frac{1}{2}$ feet.

Q. If they were $2\frac{1}{2}$ feet, you must have been at the rail?

By Mr. Crick: I wish to correct that. I have no recollection of his stating that the rail was $2\frac{1}{2}$ feet above the ladder.

By Mr. Woods: I understand that was the top rung from the railing.

Q. Mr. Nelson, when you stated that the rail was about $2\frac{1}{2}$ feet above the top of the ladder, or $2\frac{1}{2}$ feet above something, what did you mean? Did you mean the ends of the ladder? A. Yes. 489

Q. Then you say that the ends of the stanchions of the ladder were about $2\frac{1}{2}$ feet also above the last step of the ladder? A. Well, the last step was about the top of the ladder.

By Mr. Woods: I move to strike out the answer as not responsive to the question.

Q. Do you mean that the ends of the sides of the ladder and the ends of the stanchions were $2\frac{1}{2}$ feet above the last rung of the ladder? A. No, no, I didn't mean that. The ends of the ladder were a couple of inches above the last step.

Q. Don't you know that they were more than that? You are simply guessing at that. Do you remember it distinctly? A. I cannot say that, but as far as I remember that the last step was pretty near up to the end.

Q. As far as you remember. Is your recollection distinct, or is it vague and indistinct? I will restate the question. Is your recollection about the place of the ends of these stanchions clear or is it very muddy? A. About the stanchions, it is clear.

Q. Are you in the services of the Panama Company now? A. No, sir.

Q. When did you leave them? A. About the 13th of April this year.

Q. Leave of your own accord, did you?

By Mr. Crick: Objection as immaterial.

A. Yes, of my own accord.

Q. You had no particular grievance against the Panama Railroad Company? A. No, sir.

Q. Are you a good friend of Johnson's? A. Yes, he is a friend of mine.

Q. Had you been up and down that ladder yourself frequently? A. Yes, sir.

Q. Did you ever have any trouble doing it? A. Yes, I had. I never fell down though.

Q. Where did you have the trouble? A. Sometimes I thought there was another step when there wasn't.

Q. After you got to the top rung did you have any trouble then getting over the rail? A. No, after I got to the rail then I could get over.

Q. Do you know whether Johnson had been up and down there frequently himself? A. Yes, he had been up there before.

Q. Were the men obliged to go up that particular ladder, or was there another way to go up? A. Yes, there was another way to go up. A ladder amidship.

Q. This ladder was sometimes used for purposes such as Johnson went up for? A. Yes, I used that ladder most of the time.

Q. Did you see the 3rd officer go over the ladder as he came down to see Johnson? A. Yes, I saw him.

Q. Saw him when he climbed over the rail? A. Yes.

Q. Was the dodger extending above the rail at that time or was it down snug? A. It extended over the rail, it was up at that time.

Q. Have you any recollection, I don't ask you to guess, as to the height from the rail to the roof over the bridge at the point where this ladder went up? Could you say how high it was from the rail to the place where this weather cloth would fasten in bad weather? How high was that? A. About 2½ feet above the rail I think.

Q. If the dodger extended 2 feet above, it was nearly all the way? A. No, it wasn't held tight. If we held it tight it would go at least 2 feet up.

Q. How high was it at this time when it was held tight? A. About a foot above the rail in the middle.

Q. Did you hear Johnson say anything about how he was hurt? A. He told me he reached for

496 *Deposition of Robert Nelson—Cross—Redirect.*

the step and there was no step and he didn't get hold of it and he fell.

Q. Reached out for a step and didn't find it? A. He went to the last step and grabbed for a step and didn't get hold of it.

Q. That is what he told you? A. Yes.

Q. When did he tell you that, after he fell down? A. Some time after.

Q. It must have been after he fell because he couldn't tell you before? A. It was on the ship after he was lying in bed there.

497 Q. Well, he didn't say he was standing on the last rung of the ladder? A. No, he was not standing with his feet on the last rung.

Q. Did he tell you where he was standing? A. No, but he told me he reached for another step. He thought there was another step.

Q. But he didn't tell you where his feet were? A. No, he didn't tell me.

Redirect examination by Mr. Crick.

Q. When you say there was a ladder amidship, do you mean it was amidship in reference to this bulkhead of the navigating bridge? A. No, I mean amidship of the ship, half length between fore and aft.

498 Q. And it was in the aft of the navigating bridge? A. Yes.

Q. So that a person coming from the fo'castle head would use the ladder in the front of the navigating bridge? A. Yes.

Q. That ladder in front of the navigating bridge was the ladder that was in most general use by the officers and the crew to go and come from the navigating bridge to the saloon deck? A. Well, that ladder was used when you were working for-

ward or taking soundings to run up and down that way.

Q. Now, after you heard this body fall, you were asked if you saw the 3rd officer climb over the ladder? A. Yes.

Q. And he went down that ladder? A. Yes.

Q. He had hold of the railing, did he not, and had one foot over, and kept one foot over the side of the navigating bridge, and felt for the ladder with the foot hanging over from the navigating bridge? A. Yes, sir.

Q. So that his position going over and down that ladder was entirely different from the position of a person going up that ladder, especially if that person had one hand holding a weight of say about 18 or 20 pounds?

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By Mr. Woods: I object to the question as calling for a conclusion on the part of the witness.

A. Yes.

Q. I show you a sketch marked "Plaintiff's Exhibit A," and ask you if that substantially represents the ladder and the bridge, in the position of the ladder to the bridge on the day of the accident? A. Yes, sir.

Q. How far was it in your opinion from the railing of the navigating bridge, to the roof of the navigating bridge, or to the awning that covered the navigating bridge? A. It was about 21½ feet up to the awning from the rail of the bridge.

501

Q. I don't mean the dodger, I mean the awning over the bridge. A. Yes, from the rail up to the awning of the bridge about 21½ feet.

Q. You were asked if Johnson said anything to you about how he was hurt. Did he say if he had

anything in his hand at the time he was going up the ladder? A. Yes, sir.

Q. What did he tell you he had in his hand? A. He had the lead and the lead line.

Q. Were the lead and the lead line kept up on the bridge or in the wheel house? A. Up on the bridge in a box.

Q. Who on that vessel had the duty of heaving the lead and taking soundings? A. Quarter-masters.

Q. Were you leaving port at that time? A. Yes, sir.

503 Q. What port? A. Guyaquil.

Statement as to Evidence.

The foregoing case contains all the evidence upon the trial of this action.

Stipulation as to Exhibits.

505

IT IS HEREBY STIPULATED by and between the respective parties hereto that the exhibits introduced in evidence on the trial, being Plaintiff's Exhibits Nos. 1 to 10, inclusive, and Defendant's Exhibit A, consisting entirely of photographs, drawings and X-ray plates, being not reproducible or capable of being embodied in the printed record without great inconvenience, may be omitted therefrom, and that in lieu thereof the originals shall be sent to the Circuit Court of Appeals for consideration on writ of error.

IT IS FURTHER STIPULATED that the log book of the vessel, certain pages of which were offered in evidence by plaintiff's attorney and were not objected to, but which were not marked as an exhibit, contains no entry relative to the injury sustained by the plaintiff, and that no part of said log book need be printed, but that the same may be produced on the argument in the Circuit Court of Appeals if required. The said log book may be known by the following language on its cover: "Panama R. R. Steamship Line, Log Book of the S. S. Allianca from Sept. 8th, 1920, to Oct. 10th, 1920, Voy. 332."

506

Dated, New York, March 8, 1922.

SILAS B. AXTELL,

Attorney for Plaintiff-Respondent.

507

RICHARD REID ROGERS,

Attorney for Defendant-Appellant.

508 Stipulation Settling Bill of Exceptions.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties to this action that this bill of exceptions contains all the evidence given upon the trial, and that it may be settled as a true and correct bill and may be signed by the Presiding Judge and be filed herein as of the date hereof.

Dated, New York, March 8, 1922.

SILAS B. AXTELL,
Attorney for Plaintiff-Respondent.

509 RICHARD REID ROGERS,
Attorney for Defendant-Appellant.

Order Settling Bill of Exceptions.

By stipulation of the parties, the foregoing is hereby settled and ordered on file as a true and correct bill of exceptions in the above-entitled action.

Dated March 10, 1922.

J. W. WOODROUGH,
United States District Judge.

Petition for Writ of Error.

511

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

ANDREW JOHNSON,
Plaintiff,

against

PANAMA RAIL ROAD COMPANY,
Defendant.

L-1294.

512

And now comes Panama Rail Road Company, defendant herein, and says that on or about the 18th day of January, 1922, this court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereto in this cause certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Second Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

513

RICHARD REID ROGERS,

Attorney for Defendant,
Panama Rail Road Company,
Office & P. O. Address,
#63 Wall Street,
Borough of Manhattan,
New York City.

514

Citation.

**THE UNITED STATES CIRCUIT COURT
OF APPEALS,**

FOR THE SECOND CIRCUIT.

L-1294.

THE UNITED STATES OF AMERICA, }
SECOND JUDICIAL CIRCUIT, } ss. :

TO ANDREW JOHNSON, GREETING :

515

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals, for the second circuit, to be holden at the court rooms of the Circuit Court of Appeals for the second circuit, at the United States Post Office Building, in the Borough of Brooklyn, City of New York, on the 18th day of March, 1922, next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the Eastern District of New York, wherein you are defendant in error, and the Panama Rail Road Company, plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

516

WITNESS the Honorable Thomas I. Chatfield, District Judge of the United States, at Brooklyn, within said circuit, this 17th day of February, in the year of our Lord one thousand nine hundred and twenty-two, and of the independence of the United States of America one hundred and forty-fifth.

THOMAS I. CHATFIELD,
United States District Judge.

I hereby, this 18th day of February, 1922, accept due personal service of this citation on behalf of Andrew Johnson, defendant in error.

SILAS B. AXTELL,
Solicitor for Defendant in error.

Assignment of Errors.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

518

ANDREW JOHNSON,
Plaintiff.

against

PANAMA RAIL ROAD COMPANY,
Defendant.

L-1294.

The defendant in this action in connection with his petition for a writ of error makes the following assignment of errors which he avers occurred on the trial of the cause, to wit:

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FIRST: The Court erred in declining to grant defendant's motion for a nonsuit upon the grounds:

(a) Upon the ground that there was no evidence of unseaworthiness.

(b) Upon the ground that the plaintiff assumed the risk of climbing the ladder on which he fell.

(c) Upon the ground that it appeared from his own testimony that his injuries were sustained by his own negligence.

(d) Upon the ground that even if there was evidence of negligence, it was not such negligence as could be made the basis for recovery under the admiralty or maritime law.

SECOND: The Court erred in stating that he would give the plaintiff the full extent of the right and remedy under the Railroad Act.

521 THIRD: The Court erred in submitting the case to the jury solely upon the theory that the jury was to decide the question of defendant's liability under the United States Statute which applied in case of interstate railroads and their employees.

FOURTH: The Court erred in charging the jury as follows:

522 "But it appears to me in my opinion, as one of the facts shown by the evidence in this case—my opinion, not binding upon you gentlemen—that the question whether the dodger or canvas was stretched as claimed by the plaintiff at the time of his injury, is a material question material to the inquiry in determining just how the accident happened to him. It is claimed on the one hand that the dodger was not at that time spread. It is claimed on the other hand, by the plaintiff, and the testimony on his behalf, that it actually was stretched at that time, and that being so stretched it extended above the rail of the bridge, where otherwise he would have taken his hand hold, and in fact that his fall happened at the time when he was reaching up over the dodger for the hand hold."

FIFTH: The Court erred in declining to charge the jury, if the railroad statute controlled, that if the plaintiff knew the character of the ladder and used it from time to time he assumed the risk of any accident which happened to him in using the ladder under the known conditions.

SIXTH: The Court erred in declining to charge the jury, if the railroad statute controlled, that the assumption of the risk was an absolute defense.

SEVENTH: The Court erred in admitting, over the objection of the defendant, the following testimony:

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(a) The testimony of the plaintiff, allowed over the objection of the defendant, that while the ship was lying in port, in addition to his wages, he was allowed \$2.75 per day as grub money.

(b) The X-ray plates of the plaintiff's injury, admitted in evidence over the objection of the defendant.

EIGHTH: The Court erred in not dismissing the suit for lack of jurisdiction, inasmuch as the action was brought on the common law side, and it appeared from the complaint that the plaintiff and defendant were citizens of the same State.

525

NINTH: The Court erred (on the assumption that Section 33 of the Act of June 5, 1920, was valid and applied) in not dismissing the suit for lack of jurisdiction, because the suit was not brought in the District of the defendant's principal place of business.

TENTH: The Court erred in declining to grant defendant's motion for a new trial upon the grounds (a) that the verdict was contrary to the evidence; (b) that the verdict was contrary to the law, and (c) that the verdict was excessive.

ELEVENTH: The Court erred in holding that under Section 33 of the Act of June 5, 1920, the principles and provisions of the Act of Congress regulating the relations between interstate railroads and their employees controlled, inasmuch as the said Act as so construed violates Section 2 of Article III of the Constitution of the United States.

WHEREFORE, the defendant prays that the judgment of the District Court may be reversed.

RICHARD REID ROGERS,

Attorney for Defendant,

Panama Rail Road Company,

Office & P. O. Address,

±63 Wall Street,

Borough of Manhattan,

New York City.

Bond on Appeal.

529

DISTRICT COURT OF THE UNITED STATES
OF AMERICA,

FOR THE EASTERN DISTRICT OF NEW YORK

IN THE SECOND CIRCUIT.

ANDREW JOHNSON,
Plaintiff-Respondent,

against

PANAMA RAIL ROAD COMPANY,
Defendant-Appellant.

530

KNOW ALL MEN BY THESE PRESENTS, That PANAMA RAIL ROAD COMPANY, as principal, and NATIONAL SURETY COMPANY, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City, County and State of New York, as surety, are held and firmly bound unto the above named Andrew Johnson in the sum of Ten Thousand Five Hundred (\$10,500.00) Dollars, to be paid to the said Andrew Johnson, for the payment of which well and truly to be made said principal and surety bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these presents. Sealed and dated the 15th day of February, 1922.

531

WHEREAS, the above named Panama Rail Road Company has prosecuted a writ of error to the United States Circuit Court of Appeals for the Second Circuit, to reverse the judgment rendered

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Bond on Appeal.

in the above entitled suit, by a Judge of the District Court of the United States for the Eastern District of New York.

NOW, THEREFORE, the condition of this obligation is such, that if the above named Panama Rail Road Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

533

PANAMA RAIL ROAD COMPANY,

By E. A. DRAKE,
Vice-President.

Attest:

W. P. PFIZER,
Acting Secretary.

NATIONAL SURETY COMPANY,

By ROBERT M. NUGENT,
Resident Vice-President.

Attest:

534

N. V. TYNAN,
Resident Assistant Secretary.

Bond on Appeal.

535

STATE OF NEW YORK, }
 COUNTY OF NEW YORK, } ss.:

On this day of February, 1922, before me personally came Edward A. Drake, to me known, who, being by me duly sworn, did depose and say that he resides in New York City; that he is the Vice President of the Panama Rail Road Co., the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name to the said instrument by like order.

536

E. A. DRAKE.

GEORGE P. CARLIN,
 Nty. Public,
 (SEAL) N. Y. C. #389.

AFFIDAVIT, ACKNOWLEDGMENT AND JUSTIFICATION
 BY GUARANTEE OR SURETY COMPANY

STATE OF NEW YORK, }
 COUNTY OF NEW YORK, } ss.:

537

On this 15th day of February, 1922, before me personally came Robert M. Nugent, known to me to be the Resident Vice-President of National Surety Company, the corporation described in and which executed the foregoing bond of Panama Rail Road Company as surety, and who, being by me duly sworn, did depose and say that he resides in

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the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13, 1894; that the seal affixed to the within Bond of Panama Rail Road Company is the corporate seal of said National Surety Company, and was thereto affixed by authority of the Board of Directors of said Company, and that he signed his name thereto by like authority as Resident Vice-President of said Company, and that he is acquainted with N. V. Tynan and knows him to be the Resident Assistant Secretary of said Company, and that the signature of said N. V. Tynan subscribed to said Bond is in the genuine handwriting of said N. V. Tynan, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent, and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Ten Million dollars.

ROBERT M. NUGENT.

540 Signed, sworn to and
acknowledged before me this
15th day of February, 1922.

H. E. EMMETT,
Notary Public, &c.

Stipulation Settling Record.

541

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true and correct transcript of the record of the said District Court in the above-entitled matter as agreed upon by the parties.

Dated, New York, March 17, 1922.

SILAS B. AXTELL,

Attorney for Plaintiff-Respondent.

RICHARD REID ROGERS,

Attorney for Defendant-Appellant.

542

Order Filing Record.

On the consent of the attorneys for the respective parties, the foregoing printed record is hereby ordered filed in lieu of the original papers for the purpose of certifying the record on writ of error.

Dated, Brooklyn, N. Y., March 18, 1922.

THOMAS I. CHATFIELD,

D. J.

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Clerk's Certificate.

I, PERCY G. B. GILKES, Clerk of the District Court of the United States for the Eastern District of New York, do hereby certify that the foregoing is a correct copy of the transcript of record of the said District Court in the above entitled action as agreed on by the parties.

545

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Eastern District of New York, this 18 day of March, in the year of our Lord one thousand nine hundred and twenty-two, and of the Independence of the said United States the one hundred and forty-fourth ~~year~~ *year*.

PERCY G. B. GILKES, *Clerk*

(SEAL)

By J. G. Rochester, Deputy

Clerk.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIR-
CUIT, OCTOBER TERM, 1922

No. 36

[Title omitted]

In Error to the District Court of the United States for the Eastern
District of New York

Before Rogers, Manton, and Mayer, Circuit Judges

OPINION—Filed February 15, 1923

Richard Reid Rogers, for Plaintiff-in-Error.
Silas B. Axtell, for Defendant-in-Error.
Wade H. Ellis, of Counsel.

This cause comes here on writ of error to the United States District Court for the Eastern District of New York.

The plaintiff, a resident of the Borough of Brooklyn, City and State of New York, brought this action against the defendant, a New York corporation, which owned and operated the steamship *Alliance* upon which he was employed as quartermaster.

The action was brought to recover damages for injuries which the plaintiff suffered while in the performance of his duties on the ship while climbing up a ladder from the deck to the bridge and from which ladder he fell. He claims that his injuries were due to the defendant's negligence in furnishing a defective ladder and by reason of the unseaworthiness of the ship.

The complaint alleges as a second cause of action that defendant failed to furnish him with proper medical and surgical attendance although the same was requested and he was in urgent need thereof. It is further complained that defendant failed to place the plaintiff in a hospital in any of the ports at which the steamship touched thereby greatly aggravating his injuries.

The complaint states that there is now in full force and effect Section 20 of the Seaman's Act as amended by Section 33 of the Merchant Marine Act of June 5, 1920.

Damages in the sum of \$75,000 are demanded.

The jury returned a verdict for the plaintiff and assessed the damages at \$10,000.

ROGERS, Circuit Judge (after stating the above facts):

This action is brought on the common law side of the court to recover for injuries received by a seaman upon a vessel at sea.

The tort alleged occurred on navigable water—the Guanaquil River in Ecuador, South America. And all fauses arising out of transactions occurring on navigable waters are, by the general ad-

miralty law, within the jurisdiction of the admiralty courts whether the waters are part of the high seas, or are domestic or foreign.

The plaintiff has seen fit however not to sue in an admiralty court. In bringing it in a common law court he has proceeded under the Act of June 5, 1920, known as the Jones Act, 41 St. Pt. 1, 31 Ch. 250 p. 988. Section 33 of that Act amended Section 20 of the Act of March 4, 1915, to read as follows:

"Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The constitutionality of that Act is challenged however in this case. If the Act is unconstitutional there is no authority for instituting this action at law. We must, therefore, consider the objection which has been raised. If the Act is void the court was without jurisdiction and it is not necessary to consider any of the other assignments of error upon which defendant relies.

Article III, Section 2 of the Constitution declares that the Judicial power shall extend to all cases of Admiralty and maritime jurisdiction. And it is said that in view of this provision in the fundamental law Congress is without power to substitute for the maritime law regulating the rights of seamen as known and accepted when the Constitution was adopted an entirely different and common law system governing such matters.

In 1861, in *The Steamer St. Lawrence*, 1 Black, 522, 526, Mr. Chief Justice Taney writing for the court and referring to the fact that the Constitution delegates to the Federal Government the judicial power in all cases of admiralty and maritime jurisdiction, declares that "certainly no State law can enlarge it, nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits." The court in that case, however, recognized the power of Congress to alter and change the forms and modes of proceeding in the admiralty courts in matters having no relation to the subject of Jurisdiction and to transfer the trial of seamen's causes from the admiralty to the common law courts.

The fact that the Constitution extended the judicial power of the Federal courts to the admiralty and maritime jurisdiction and that this meant the admiralty and maritime law at the time the Con-

situation was adopted does not preclude Congress from subsequently making alterations in the system of law thus referred to. And it has never been understood that the rights of seamen existing under the maritime law would in all cases have to be asserted in the courts of admiralty to the exclusion of the courts of common law.

Mr. Justice Story in his Commentaries on the Constitution referring to the grant of admiralty jurisdiction wrote as follows:

"The reasonable interpretation would seem to be that it conferred on the national judiciary the admiralty and maritime jurisdiction, exactly according to the nature and extent and modifications in which it existed in the jurisprudence of the common law. When the jurisdiction was exclusive, it remained so; when it was concurrent, it remained so. Hence the states could have no right to create courts of admiralty as such, or to confer on their own courts the cognizance of such cases as were exclusively cognizable in admiralty courts. But the states might well retain and exercise the jurisdiction in cases of which the cognizance was formerly concurrent in the courts of common law. The latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction than cases of common law." 3 Com. on Const., sec. 1096.

The fact must therefore be kept in mind that in a certain class of cases affecting the rights of seamen the courts of admiralty and the courts of common law had and still have a concurrent jurisdiction, and that that class of cases are not to be regarded as exclusively pertaining to the admiralty jurisdiction and as such to be heard in an admiralty court, and so are beyond the power of Congress to affect by its legislation.

In the Judiciary Act of 1789, St. vol. 1, p. 76, ch. 20, the right of the common law courts was recognized and it was provided that the Federal District Courts should have exclusive jurisdiction of all cases of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it." And that provision has ever since remained unrevoked. Rev. St. 563, sec. 8.

The maritime law afforded two remedies. One was a proceeding in rem and the other was a proceeding in personam. Where the proceeding was in rem the jurisdiction of admiralty was exclusive, where it was in personam the courts of common law had a concurrent jurisdiction. And when a party came into the common law court with a proceeding in personam which he might have brought in the admiralty court, the cause was disposed of according to the procedure which governed that class of courts and was tried with a jury. It certainly cannot now be questioned that the Act under which the plaintiff proceeded was in any respect invalid in providing that a seaman who suffers a personal injury in the course of his employment may sue at law and have a right to a trial by jury.

But while a seaman who was injured in the service of his ship has from the beginning had a right to sue in the common law court and to have a jury trial the amount he was entitled to recover was not measured by common law standards but by those pre-

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scribed by the maritime law. By that law the vessel owner was liable to a seaman injured by the negligence of a member of the crew, whether a superior officer or not, only for his maintenance, cure and wages. *The Oscola*, 189 U. S. 158; *Chelentis v. Luckenbach Steamship Company*, 247 U. S. 372. The Jones Act, however, extends the seaman's right to recover damages for personal injuries and applies in such cases the remedy given under the statutes of the United States to railway employees.

In *The Lottawana*, 21 Wall. 558, 557, the Court, referring to the maritime law, said:

"It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed."

The Congress has, for example, long since changed the rule of unlimited liability imposed upon shipowners by the maritime law, and created a limited liability. This it first did by an Act passed March 3, 1851. The matter came before the Supreme Court in *The Scotland*, 105 U. S. 24, 31, and Mr. Justice Bradley, referring to the Statute, said:

"But it is enough to say, that the rule of limited liability is now our maritime rule. It is the rule by which through the act of Congress, we have announced that we propose to administer justice in maritime cases."

Again in *Butler v. Boston and Savannah Steamship Co.*, 130 U. S. 527, the Statute limiting liability was before the court and was held applicable to cases of personal injury and death, as well as to cases of loss of or injury to property. In that case certain earlier cases in the court were commented upon, and Mr. Justice Bradley, speaking for the court, said:

"These quotations are believed to express the general, if not unanimous, views of the members of this court for nearly twenty years past; and they leave us in no doubt that, whilst the general maritime law, with slight modifications, is accepted as law in this country, it is subject to such amendments as Congress may see fit to adopt. One of the modifications of the maritime law, as received here, was a rejection of the law of limited liability. We have rectified that. Congress has restored that article to our maritime code. We cannot doubt its power to do this. As the Constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction,' and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature, and not in the state legislatures. It is true, we have held that the boundaries and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, and cannot be affected or controlled by legislation, whether state or national. Chief Justice Taney, in *The St. Lawrence*, 1 Black, 522.

526, 527; *The Lottawana*, 21 Wall. 558, 575, 576. But within these boundaries and limits the law itself is that which has always been received as maritime law in this country, with such amendments and modifications as Congress may from time to time have adopted."

In *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, the court had before it the Act of October 6, 1917, c. 97, 40 Stat. 395, which sought to amend Section 9 of the Judiciary Act of 1789, hereinbefore cited. Section 9 of the Act of 1789 granted to the United States District Courts, as we have already pointed out, exclusive jurisdiction of all causes of admiralty and maritime jurisdiction "Saving to suitors, in all cases the right of a common law remedy, where the common law is competent to give it." The Act of 1917 added to the above provision "and to claimants the rights and remedies under the Workmen's compensation law of any State." The Supreme Court held, Justice Holmes, Pitney, Brandeis and Clark dissenting, that this attempted amendment was unconstitutional as being a delegation of the legislative power of Congress to the States and as defeating the purpose of the Constitution respecting the harmony and uniformity of the maritime law. The majority opinion, however, conceded the right of Congress to alter the rules of the maritime law. Referring to the intention of the framers of the Constitution to commit direct control of the maritime jurisdiction to the Federal Government and to have a harmonious and uniform system of maritime law, Mr. Justice McReynolds, writing for the majority of the court, said:

"Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended or changed except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the States to do so as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established—it would defeat the very purpose of the grant. See *Sudden & Christenson v. Industrial Accident Commission*, 188 Pac. Rep. 803."

The Supreme Court in *The Harrisburg*, 119 U. S. 199, where the subject was elaborately considered in an opinion written by Chief-Justice Waite, unanimously held that an action would not lie in the courts of the United States under the general maritime law to recover damages for the death of a human being on navigable waters. And see *The Albert Dumois*, 177 U. S. 240, 259. In *The Hamilton*, 207 U. S. 398, the court held, however, that in a proceeding in admiralty effect would be given to a state statute giving damages for death occurring in a collision at sea between two vessels which be-

longed to corporations of the State of Delaware which passed the statute. And this doctrine was adhered to and applied in *La Bourgogne*, 240 U. S. 95, which was a French vessel which sank at sea in a collision with a British vessel. It appeared that the law of France, the Code Napoleon, gave a right of action for wrongful death. It is very evident, therefore, that it must be within the power of Congress to change the maritime law by giving a right of action in case of death upon waters within the admiralty jurisdiction of the United States.

And if the Congress, as we have seen it has, has the power to limit the liability of the ship or its owners within the admiralty and maritime jurisdiction of the United States, it must by the same process of reasoning have the right to otherwise alter or increase that liability. And we see no reason to doubt that Congress possesses the power to declare that ship owners shall be subject to the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect to their employees on shore, and that it may specifically provide that statutes applying to personal injury actions of railway employees shall apply to similar actions by seamen.

Neither can there be any serious question raised as to the right of Congress to incorporate in an Act other statutes by reference to them. Such statutes have been sustained so uniformly that the power of Congress is not now open to argument. The object of such incorporation as was said in *The Binghamton Bridge*, 3 Wall. 51, 79, is to avoid encumbering the statute-book by useless repetition and unnecessary verbiage. See *People v. Grossley*, 261 Ill. 78; *Turney v. Wilton*, 36 Ill. 385; *Garland v. Hickey*, 75 Wis. 178; *Quinlan v. Houston & R. Co.*, 89 Texas 356; *Spring Valley Water Works v. San Francisco*, 22 Cal. 434. In some of the State constitutions it has been provided that no act shall be passed incorporating an existing law except by inserting it therein. But the Constitution of the United States contains no such provision.

It remains to point out that certain other objections have been raised to the validity of the Jones Act. But before referring to them we deem it necessary to call attention to certain fundamental and well established principles which it is necessary to keep in mind and by which we must be governed. It is the duty of every judicial tribunal to determine rights of persons or property which are actually involved in the particular case before it. As the Supreme Court had occasion to say in *California v. San Pablo & Tulare Railroad*, 149 U. S. 308, 314, "the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties, or counsel, whether in the case before the court, or in any other case, can enlarge the power or affect the duty of the court in this regard." See *Lord v. Veazie*, 8 How. 251; *Cleveland v. Chamberlain*, 1 Black. 419; *Kimball v. Kimball*, 174 U. S. 158; *Tyler v. Judges of Court of Registration*, 179 U. S. 405, 408. It is necessary for the plaintiff to show that the alleged unconstitutional features of the law injure him

and so operate as to deprive him of rights secured to him by the Constitution. *Southern Railway Co. v. King*, 217 U. S. 524, 534; *Hatch v. Reardon*, 204 U. S. 152, 160; *Hooker v. Burr*, 194 U. S. 415; *Middleton v. Texas Power & Light Co.*, 249 U. S. 152, 156, 157. And this the defendant herein has not done.

In *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576, the Court declared it to be the well settled rule of the Court that it only hears objections to the constitutionality of laws from those who are themselves affected by the alleged unconstitutionality in the feature complained of. And see *Plymouth Coal Company v. Pennsylvania*, 232 U. S. 531, 544; *Rosenthal v. New York*, 226 U. S. 260, 271.

In the *Arizona Employers' Liability Cases*, 250 U. S. 400, the Constitutionality of the State statute was assailed on the ground that the Act made no distinction between hazardous and non-hazardous industries and was on that account invalid, but the court declared that the plaintiff-in-error had no standing to raise the question as the occupations in which the actions arose were indisputably hazardous.

And in the same case the objection was also made that the benefits of the Act could be extended in the case of death claims to those not nearly related or dependent upon the workman and might even go by escheat to the State. In reply the court declared that no such construction had been put upon the Act, and that it was sufficient to say that no such question was in the records and that it was improper for the Supreme Court to assume in advance that the State courts would place such a construction upon the statute as to render it obnoxious to the Federal Constitution.

In a recent case, *National Harness Mfgs.' Association v. Federal Trade Commission*, 268 Fed. 705, the Circuit Court of Appeals for the Sixth Circuit held that a party cannot complain of invalid sections of a statute where such sections are not invoked against him. In that case a petitioner seeking review of an order by the Federal Trade Commission requiring the petitioner to desist from certain practices was held unable to raise the question that the inquisitorial features of the Federal Trade Commission Act violated the Constitution where the Commission had not attempted to exercise against him the alleged invalid sections of the Act. The court declared that it was enough to say that the provisions assailed were not before the court.

The Jones Act is said to be unconstitutional in that it provides that "all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply." And because it further provides in giving a right of action in case of death of any seaman as a result of personal injury that in such action "all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable." As respects the provision relating to death cases it is apparent that as this action is not brought to recover for the death of a seaman the question as to the constitutionality of that provision cannot be raised upon this record.

As respects the provision that "all Statutes of the United States modifying or extending the common law right or remedy in cases

of personal injury to railway employees shall apply," it is argued that it is a piece of hasty and ill-considered legislation and so vague and uncertain that no ship owner can tell what his duties are and no seaman can tell what his rights are. It is said that in particular cases it would be impossible for the court to determine what provisions of law are applicable and what special statute for the benefit of railway employees is the basis of the action. Then we are told that it is well settled that if a statute is doubtful and uncertain or is such as to make it difficult or impossible to comply with its provisions it will be held to be of no force and effect. It is added that the phrase "all statutes," etc., would make applicable not merely the Federal Employers' Liability Act of April 22, 1908, 35 St. 65, ch. 149, but the Safety Appliance Act of March 2, 1903, 32 St. 943, ch. 976, and the Boiler Inspection Act of February 17, 1911, 36 St. 913, ch. 103, and the Hours of Service Act of March 3, 1907, 34 St. 1415, ch. 2939. The answer to all this is that the court below did not apply and was not asked to apply any of these Acts except certain provisions in the Federal Employers' Liability Act. Whether there are provisions in any of the other Acts named which were intended to be included in the Jones Act and which make it invalid is not before the Court upon this record and need not be considered as neither the plaintiff nor the defendant has been affected by them in any manner in this action.

It is necessary now to consider the validity of the Federal Statute which was directly involved in the case now before the court and which actually affected the rights of the parties. That we may understand in what manner the rights of the parties were actually affected a consideration of the principles of the admiralty law applicable to cases of this character prior to the enactment of the Jones Act is important. The rules of the admiralty law governing injuries to seamen were stated in *The Osceola*, 198 U. S. 158, 175, as follows:

"1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Searff v. Metcalf*, 107 N. Y. 211.

3. That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.

4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled

to maintenance and cure, whether the injuries were received by negligence or accident."

It thus appears that under maritime law a seaman was not allowed to recover anything more than his maintenance and cure and his wages for injuries resulting from accident or the negligence of the master or a member of the crew. But that he might recover an indemnity for injuries due to the unseaworthiness of the ship, or resulting from a failure to supply and keep in order the proper appliances appurtenant to the ship.

The present case was tried in the court below upon the theory that by reason of the Jones Act the Federal Employers' Liability Act applied. That Act in Section 2 made a common carrier by railroad liable in damages to any person suffering injury while he is employed by such carrier, and that he might maintain an action at law with the right of trial by jury.

It was supposed that by virtue of the provision cited from the Federal Employers' Liability Act the right of the seamen to recover indemnity or damages is no longer restricted to seamen who receive injuries due to the ship's unseaworthiness or which result from a failure to supply and keep in order the ship's appliances, and that the right to sue for damages is now given to seamen who suffer injuries in the course of their employment.

The rules of the admiralty as laid down in the *Osecola* case differ in certain particulars, while they correspond in others, from the principles of the common law. And in view of the changes introduced into the maritime law by the Jones Act and the Employers' Liability Act we deem it important to refer to them inasmuch as their validity has been challenged in this action.

At common law a master was not liable for injuries personally suffered by his servant through the negligence of a fellow servant while engaged in the same common employment. In admiralty the same general rule prevailed and the seaman was not entitled to recover in an indemnity suit if his injuries resulted from the negligence of a fellow servant. This was made very plain by Judge Addison Brown in *The City of Alexandria*, 17 Fed., 390. The same doctrine was applied in *Quebec Steamship Co. v. Merchant*, 133 U. S. 375, 378, where Justice Blatchford, writing for the court, said: "The case, therefore, falls with the well settled rule, as to which it is unnecessary to cite cases, which exempts an employer from liability for injuries to a servant caused by another servant. * * *." That this was the law is also stated in the third rule already quoted from the opinion of *The Osecola*, *supra*. But in suits not for indemnity but for maintenance and cure as stated in *Chelentis v. Luckenbach SS. Co.*, 247 U. S. 273, 384, the maritime law imposed upon a ship owner liability to a member of the crew injured at sea by reason of another member's negligence without regard to their relationship.

The Employers' Liability Act in Section 2 makes a common carrier by railroad liable in damages to an employee where the injury results in whole or in part from the negligence of any of the officers,

agents, or employees of such carrier." It also makes the carrier liable for an injury to the employee arising from any defect or insufficiency due to its negligence "in its cars, * * * appliances, machinery, * * * boats * * * or other equipment." 35 St. p. 65, ch. 149.

And in the Act of March 4, 1915, 38 St. p. 1164, ch. 153, sec. 20, it was provided that in any suit to recover damages for any injury sustained on board the vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority. The fellow servant rule is not, however, invoked in the present action and we are not further concerned with it.

It was also a principle of the common law that one who understands and appreciates a risk and voluntarily exposes himself to it cannot recover for an injury which results from the exposure. This doctrine of assumption of risk rests on the principle expressed in the maxim *volenti non fit injuria*. This doctrine was applied in the admiralty as in other branches of jurisprudence. It was recognized and applied in this court in *The Saratoga*, 94 Fed. 221, where, referring to the doctrine of assumption of risk, the court said "This has been held so many times that it is unnecessary to cite authorities. The principal ones will be found referred to and discussed in the exhaustive opinion of the learned district judge." The opinion thus referred to is found in 87 Fed. 349.

The Federal Employers' Liability Act did not change the rule relating to assumption of risk except that Section 4 of it provides that in actions brought against any common carrier under any of the provisions of the Act to recover damages for injuries to or the death of any of its employees such employee shall not be held to have assumed the risks of his employment in any case where the violation enacted for the safety of employees contributed to the injury or death of the employee. The Act therefore does not abolish the defense of assumption of risk but leaves the law as it was before except in cases in which the violation of a statute enacted for the safety of employees contributed to the injury or death. As in this case it is not claimed that any such statute has been violated we are not at all concerned with it.

It was, too, a rule of the common law laid down in *Butterfield v. Forrester*, 11 East 60, a leading case in English law, that one whose own negligence proximately contributes to his injury cannot recover any compensation from the defendant although the latter's primary negligence caused the injury complained of. And see *Railroad Co. v. Jones*, 95 U. S. 439. But the courts of admiralty did not allow the contributory negligence of the defendant to defeat his suit. As was said by Justice Story in *The Palmyra*, 12 Wheat. 1, 17, in the admiralty the award of damages always rests in the sound discretion of the court under all the circumstances. So that in cases of contributory negligence the admiralty court grants damages if it appears to it that to do so is in accordance with principles of equity and justice. 1 C. J. 1327.

The Employers' Liability Act changed the common law rule on the subject of contributory negligence by providing in Section 3 that in

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actions brought under the Act the fact that the employee may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. But while this changed the rule of the common law it adopted the rule of the admiralty courts. It, however, also provided "That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." With this last provision we are not concerned in this case for, as before remarked, it has not been claimed that any statute was violated by the shipowner. And with the first provision we are not concerned as it merely adopts the maritime rule.

Unless it was beyond the power of Congress to modify the maritime law in the particulars in which it was modified by making the Employers' Liability Act applicable to a case of this nature the Jones Act must be held valid so far as it is involved in this suit. We entertain no doubt but that it was within the authority of Congress by the Jones Act to make the Employers' Liability Act applicable to seamen injured upon navigable waters within the maritime jurisdiction of the United States. As declared in *Southern Pacific Company v. Jensen*, 244 U. S. 205, 215, 216, and repeated in *Chelentis v. Luckenbach SS. Co.*, 247 U. S. 372, 381, Congress has paramount power to amend and determine the maritime law which shall prevail in this country. The system of maritime law as changed in still coextensive with and operating uniformly in the whole of the United States. The changes introduced into the system by making the Employers' Liability Act applicable to seamen who suffer personal injury in the course of their employment does not violate any constitutional right of the defendant and does not exceed the powers of the Congress.

This brings us to a consideration of certain errors which it is claimed were committed by the District Judge in his charge to the jury. The jury was instructed as follows:

"The law further provides in any action brought under this law to recover damages for injuries an employee shall not be held to have assumed the risks of his employment in any case where the violation by the employer of the statute enacted for the safety of employees contributed to the injury of the employee. That is to say, he assumes such ordinary risks of his job or employment as are known to him, or that he becomes familiar with, and that you conclude he must become familiar with in the ordinary course of the employment; except that he does not assume the risk that results from carelessness on the part of his superior, or for negligence, from defects or insufficiency of the appliances and equipment that are provided for carrying on his work."

And as to this there are two assignments of error as follows:

"Fifth. The Court erred in declining to charge the jury, if the railroad statute controlled, that if the plaintiff knew the character of

the ladder and used it from time to time he assumed the risk of any accident which happened to him in using the ladder under the known conditions.

Sixth. The Court erred in declining to charge the jury, if the railroad statute controlled, that the assumption of the risk was an absolute defense."

It was claimed that the plaintiff, who met his injuries in falling from the ladder, had been employed upon the ship seventeen months and was entirely familiar with the ladder. And it is said that except where the risk is created by the violation of a statutory rule, railroad employees assume the risk under the Federal Employers' Liability Act just as they did at common law. The Supreme Court has held in a number of cases that assumption of risk is a bar to the action in a case governed by the Federal Employers' Liability Act. *Pryor v. Williams*, 254 U. S. 43; *Boldt v. Pennsylvania R. R. Co.*, 245 U. S. 441; *Erie R. R. Co. v. Purucker*, 244 U. S. 441; *Chesapeake & Ohio Ry. Co. v. Deatley*, 241 U. S. 310; *Jacobs v. Southern Ry. Co.*, 241 U. S. 229; *Seaboard Air Line Railway v. Horton*, 233 U. S. 492.

We have, however, already seen that the doctrine of assumption of risk does not owe its origin to the Federal Employers' Liability Act. It existed, both at common law and in the admiralty before that Act was passed and Section 4 of the Act merely eliminated the defence of assumption of risk in the cases indicated therein.

It has been said that assumption of risk rests upon contract. *George v. St. Louis & S. F. R. Co.*, 225 Mo. 364; *Buena Vista Extract Co. v. Hickman*, 108 Va. 665; *Miller v. White Bronze Monument Co.*, 141 Iowa 701; *Diamond Block Coal Co. v. Cuthbertson*, 166 Ind. 290; *Poole v. American Linseed Co.*, 103 N. Y. Supp. 1047, 1048; *Western Furniture & Mfg. Co. v. Bloom*, 76 Kans. 127; *Johnson v. Mammoth Vein Coal Co.*, 88 Ark. 243. It is said to involve an implied agreement by the employee to assume the risk. *Hall v. Northwestern R. Co.*, 81 S. C. 522. On the other hand it is denied that the doctrine rests upon contract or depends in any manner upon the agreement of the parties. It is said to be founded upon public policy. *Denver & R. G. R. Co. v. Norgate*, 141 Fed. 247, 253; *Denver & R. G. R. Co. v. Gannon*, 40 Col. 195; *Rase v. Minneapolis, St. P. & C. R. Co.*, 107 Minn. 260; *Osterhohn v. Boston & Montana Consol. Copper & Silver Mining Co.*, 40 Mont. 508.

In *Narremore v. Cleveland, C. C. & St. L. Ry. Co.*, 96 Fed. 298, 301, Judge Taft, writing for the Circuit Court of Appeals of the Sixth Circuit, said:

"Assumption of risk is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself; but the

correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed expressly or impliedly to assume."

In *St. Louis Cordage Co. v. Miller*, 126 Fed. 485, 502, Judge Sanborn, writing for the Circuit Court of Appeals of the Eighth Circuit, said:

"Assumption of risk is the voluntary contract of an ordinarily prudent servant to take the chances of the known or obvious dangers of his employment, and to relieve his master of liability therefor."

In *Jellow v. Fore River Ship Building Co.*, 201 Mass. 461, 467, the Supreme Court of Massachusetts said on this same subject:

"It should not be overlooked that, where the use of the term 'risk' and 'acceptance of the risk' are involved, the true question is, whether in incurring the particular danger in question the plaintiff accepted the risk in the sense that by continuing at his work he agreed to relieve the defendant from the possible results. The plaintiff consequently not only must be shown to have known of the risk but, by implication from his conduct, must be found to have voluntarily assumed it. *Wagner v. Boston Elevated Railway*, 188 Mass. 437, 440, 441, and cases there cited."

That the act of the servant in assuming the risk must have been voluntary and not under constraint is well established law. In *Shearman & Redfield on Negligence*, vol. 1, 6th ed. sec. 207, the law is said to be that "a risk must be voluntarily assumed, to relieve the master from liability. Risks incurred under coercion are not assumed." And in Section 211*a* it is said:

"As already stated, it is now held by the most conservative authorities, that a servant is not deprived of his right to recover for defects caused by his master's negligence, arising or first coming to the servant's notice, after he has entered into service, unless he assumes the risk of his own free and unconstrained will. If, therefore, he continues to incur the risk of such defects, under any kind of necessity, or coercion, he does not voluntarily assume the risk, and is not, necessarily, debarred from recovery thereby."

Richmond & E. Ry. Co. v. Norment, 84 Va. 167; *O'Malley v. South Boston Gas Light Co.*, 158 Mass. 135; *Lee v. St. Louis M. & S. E. R. Co.*, 112 Mo. App. 372; *Race v. Minneapolis, St. Paul & E. R. Co.*, 107 Minn. 260; *Montgomery v. Seaboard Air Line Ry.*, 73 S. C. 503; *Elie v. Cowles*, 82 Conn. 236. And in *Labatt on Master and Servant*, vol. 4, 2nd ed., sec. 1365, p. 3934, it is said:

"If a danger is not so absolute or imminent that injury must almost necessarily result from obedience to an order, and the servant obeys the order and is injured, the master will not afterwards be

allowed to defend himself on the ground that the servant ought not to have obeyed the order."

In considering whether the plaintiff voluntarily assumed the risk we may consider the nature of his employment. This man was a seaman and was injured while obeying an order given him by an officer of his ship and which directed him to climb the ladder. It is the duty of seamen to remain with the ship and to act in obedience to the commands of the master. Disobedience of orders by a seaman may involve him in serious consequences and subject him to possible forfeiture of the wages previously earned and to imprisonment by the master. And if he leaves the ship without the master's consent and just cause he in like manner forfeits his wages and is liable to imprisonment. See *The City of Norwich*, 279 Fed. 687, 699.

A master of a vessel has authority to enforce discipline on his ship, and to compel the obedience of seamen and may inflict corporal punishment upon them. In 20 Am. & Eng. Ency. of Law, p. 203, it is laid down that his authority in this respect "is of a summary character, and somewhat resembles that of a parent over his children, a master over his servants or apprentices or a schoolmaster over his scholars." This power he has in order to maintain the good order and discipline of the ship. And as a means of punishment he may imprison or confine a seaman on the vessel. And the misconduct of a seaman may work a forfeiture of wages previously earned. 35 Cyc. 1224.

In cases of an aggravated character it may involve also an absolute forfeiture of his clothing and effects on board the ship. It is the duty of a seaman to remain with the ship to the expiration of his term of service and if he quits the ship without justifiable cause he also forfeits his wages already earned and his effects on board the ship.

All these circumstances must be considered in determining whether the plaintiff in obeying the order given him can be said voluntarily to have assumed the risk which was involved. We do not think it can be said that as a matter of law the risk involved, in obeying the order, was so absolute or imminent that a person of ordinary prudence similarly situated would have disobeyed it, or that the plaintiff should be held voluntarily to have assumed it. We do not think that under the circumstances the defendant can be heard to say that the plaintiff ought not to have obeyed the order or that in obeying it he voluntarily assumed the risk. As was said by the New York Court of Appeals in *Searff v. Metcalf*, 107 N. Y. 211, 215, "The master's authority is quite despotic and sometimes roughly exercised, and the conveniences of a ship out upon the ocean are necessarily narrow and limited. That which on land would be contributory negligence the maritime law scarcely recognizes and readily excuses. (*The City of Alexandria*, 17 Fed. Rep. 390, 395), and in many ways throws its protection around the seaman."

There is, however, no necessity for basing this decision on the doctrine that the plaintiff cannot be regarded as having voluntarily assumed the risk. The maritime law imposed upon the ship owner the risk incident to the use of defective and dangerous appliances,

and we see nothing in the new legislation which changes the law in this regard. The Federal Employers' Liability Act did not create the law—it simply recognizes it as it already existed and restricted it in the classes of cases embraced in Section 4 of the Act. What the law previously was is stated by this court in *Cricket S. S. Co. v. Parry*, 263 Fed. 523, in which we held that a ship owner cannot avoid liability for injury to a seaman by a defective and dangerous appliance, on the ground that the seaman knew of the defect when he shipped. We declared in that case that if a ship owner supplied a defective and dangerous appliance when a proper one could not be obtained he did so at his own risk and not at the risk of the seaman. There are cases in the other Circuits holding the same doctrine. *The Fullerton*, 167 Fed. 1; *The Colusa*, 248 Fed. 21 (both in the 9th Cir.); *Blöge S. S. Co. v. Moss*, 245 Fed. 54 (6th Cir.); *Lafourche Packet Co. v. Henderson*, 94 Fed. 871 (5th Cir.). The law as laid down in the above cases is amply sufficient to justify the plaintiff's position that he did not assume the risk arising from the insufficient and dangerous apparatus which the ship owner furnished at its and not the plaintiff's risk.

The defendant charges error in that portion of the charge in which reference was made to a canvas or weather dodger stretched above the bridge rail and in front of the ladder and at the top of it. But what we have already said concerning the ship owner's liability for defective appliances makes it unnecessary to comment upon that portion of the charge referred to, for if the court erred its error certainly did not prejudice the defendant.

Judge Mayer authorizes the writer to say that, while he concurs in this opinion he expresses some doubt as to the constitutionality of the act in so far as it incorporates other statutes not by specific reference but by the general reference to statutes of the United States "modifying or extending the common law right or remedy in cases of personal injury to railway employees * * *."

Judgment affirmed.

[Title omitted]

Error to the District Court of the United States for the Eastern District of New York

JUDGMENT—Filed Feb. 23, 1923

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

M. T. M.

J. M. M.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

[File endorsement omitted.]

[Title omitted]

SECOND OPINION—Filed May 14, 1923

ROGERS, Circuit Judge:

A decision in this case was filed in this court on February 15, 1923, and is reported in — Fed., —. At the time the case was argued in this court the jurisdictional question was not called to our attention. We therefore, *ex mero motu*, directed a re-argument upon that question, after our decision on the merits was handed down and that is the sole question now to be considered.

The plaintiff below is a seaman who sued the defendant in a common law action to recover indemnity for personal injuries suffered by him at sea upon a vessel owned by the defendant company. The action was brought under the Merchant Marine Act of June 5, 1920, otherwise known as the Jones Act, 38 St. p. 987, ch. 250). Section 33 of that Act gives to any seaman who suffers personal injury in the course of his employment the right at his election to maintain an action for damages at law with the right of trial by jury, and provides that in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply. And it further provides: "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The action was brought in the Eastern District of New York. The plaintiff alleged in his complaint that he is a resident of the Borough of Brooklyn, City and State of New York. Brooklyn is within the Eastern District of New York. But the plaintiff also alleged, although upon information and belief, that the defendant is a domestic corporation having its principal office and place of business in the Borough of Manhattan, City and State of New York. The answer did not deny the above allegation. And as the Borough of Manhattan is in the Southern District of New York, the suit was not brought in the District of the defendant's principal place of business, and the question arises whether the action can be maintained—the record failing to disclose that the question of jurisdiction was raised by the defendant in the court below. Did the defendant waive jurisdiction by not entering a special appearance and pleading to the jurisdiction?

It is well settled law that the jurisdiction of courts over the persons of the parties to the suit is one of personal privilege and if a party appears failing to make objection to the jurisdiction over his person

in limine the objection is waived. *Rhode Island v. Massachusetts*, 12 Peters 817; *Toland v. Sprague* 12 Peters, 300; *Harkness v. Hyde* 98 U. S. 476. The failure to object at the proper time is a waiver of what is a personal privilege and is a consent to the jurisdiction. It is the rule that a general appearance confers jurisdiction in personam over the person so appearing. *Shields v. Thomas* 18 How. 253; *Kerp v. Michigan &c. R. R. Co.*, 14 Fed. Cas. No. 7727; *Pond v. Vermont Valley R. Co.*, 19 Fed. Cas. No. 11235; *Fife v. Bohlen* 22 Fed. 878; 4 C. J. 1352.

Another question is presented where a court has no lawful power to act by reason of the fact that it is without jurisdiction over the subject matter of the litigation. Where a court has no jurisdiction over the subject matter it cannot be conferred by consent of parties. This want of jurisdiction of the subject matter cannot be waived by a failure to raise the objection in limine or at any particular stage of the proceedings. The want of such jurisdiction may be raised even on appeal. *In re Winn* 213 U. S. 458; *Andrews v. Andrews* 188 U. S. 14; *Creighton v. Kerr*, 20 Wall. 8. And the appellate court may itself ex mero motu raise the objection and dismiss the bill.

The fundamental question therefore is did the District Court have jurisdiction of the subject matter?

Section 24 of the Judicial Code, so far as it is material to the question under consideration provides as follows:

"The district courts shall have original jurisdiction as follows:

First. Of all suits of a civil nature, at common law or in equity; where the matter in controversy exceeds, exclusive of the interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States. * * *

The Section gives the district courts original jurisdiction "of all suits of a civil nature at common law or in equity" arising "under the Constitution or laws of the United States." The language of the Judiciary Act of September 24, 1789, which established the Judicial Courts of the United States, provided in Section 11 that the Circuit Courts should have original cognizance "of all suits of a civil nature at common law or in equity * * *". The clause "All suits of a civil nature at common law" has long been embodied in the statutes of the United States defining the jurisdiction of the federal courts. Its meaning is well established, and it is the settled doctrine that whenever any statute is passed which authorizes the commencement of a civil suit and under which a suit can be maintained at law jurisdiction cannot be defeated because the suit could not have been maintained in that form at the common law when the United States came into existence as a nation or prior to the enactment of the Statute. *United States v. Block* 24 Fed. Cas. p. 1176, No. 14,610.

The Seventh Amendment of the Constitution declares that in suits at "common law" the right of trial by jury shall be preserved. The phrase "common law" as the Supreme Court has held gives the

right to a jury trial not merely in such suits as the common law recognized "among its old and settled proceedings" but in suits in which legal rights were to be ascertained and determined in contradistinction to those in which equitable rights alone were recognized and equitable remedies were administered or in the courts of admiralty which proceeded in part upon equitable principles. *Parsons v. Bedford* 3 Peters 433, 446. And in *United States v. Holliday*, 3 Wall. 197, 414, 415, Mr. Justice Miller, speaking for the Supreme Court and referring to the provisions in the Judiciary Act of 1789 creating the federal courts and defining their jurisdiction, declared that it could not be supposed that "it was intended to limit the grant to such cases as were then cognizable in those courts," and held that Section 12 of that Act, defining jurisdiction, was prospective and embraced all cases the jurisdiction of which might be vested in the district courts by subsequent statutes. And see *Briesenden v. Chamberlain*, 53 Fed. 307; *Kirby v. Chicago & N. W. Ry. Co.*, 106 Fed. 551.

The Jones Act, Sec. 33, provides, as we have seen, gives to any seaman who suffers personal injury in the course of his employment, the right if he so elects to maintain an action for damages at law with the right of trial by jury. If it be assumed that he had no such right previously then the right is one arising under a law of the United States and the amount in controversy being in excess of \$3,000 and the suit being of a civil nature it would seem to be clearly within the original jurisdiction of the District Court as conferred by Section 24 of the Judicial Code, so far as the subject matter of the suit is concerned.

And when the subject matter of the action is within the jurisdiction of the court the requirement that the action be brought within a particular district may be waived. *United States v. Hyoslef*, 237 U. S. 1; *Thames and Mersey Marine Insurance Co. v. United States*, 237 U. S. 19; *Interior Construction Co. v. Gibney*, 160 U. S. 217. Where a suit arises under the constitution or laws of the United States and the requisite amount is involved it comes within the general jurisdiction of the District Courts, and where the case as thus explained is within the general jurisdiction of the court the restriction that no civil suit shall be brought in any district against any person in any other district than &c. merely establishes a personal privilege which the defendant may waive. *General Investment Company v. Lake Shore and Michigan Southern Railway Co.*, decided by the Supreme Court on November 27, 1922, and not yet reported. *Lee v. Chesapeake & Ohio Railway Co.*, decided by the Supreme Court on January 22, 1923, and not yet reported, which expressly overrules *Ex parte Wisner*, 203 U. S. 449. These cases construe Section 55 of the Judicial Code which provides, subject to exceptions not material here, that " * * * no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." And in the *General Investment Company* case the court, in passing

upon the above section, said: "This restriction, as repeatedly has been held, does not affect the general jurisdiction of a District Court over a particular cause, but merely establishes a personal privilege of the defendant, which he may insist on, or may waive, at his election, and does waive, where suit is brought in a district other than the one specified, if he enters an appearance without claiming his privilege.

We therefore conclude that the provision in the Jones Act which states that "jurisdiction in such action shall be under the court of the district in which the defendant employer resides, or in which his principal office is located" relates not to the jurisdiction over the subject matter of the action but to the jurisdiction over the person and that the provision must be understood as merely establishing a personal privilege which the defendant may insist on, or may waive at his election, and does waive, where suit is brought in a district other than the one specified, if he enters an appearance without claiming his privilege.

In *In re Moore* 209 U. S. 490 it was held that where there was a diversity of citizenship which gave jurisdiction to some Circuit Court, the objection that there was no jurisdiction in a particular district might be waived by appearing and pleading to the merits. Where, however, upon the face of the record no court of the United States had jurisdiction of the controversy, originally or by removal, the consent of the parties cannot confer jurisdiction. In *re Winn*, 213 U. S. 458, 469; *Louisville & Nashville R. R. Co. v. Mottley*, 211 U. S. 149.

In *Leon v. United States Shipping Board* 286 Fed. 681 Judge Mayor sitting in the Southern District of New York held that under the Jones Act the action had to be brought in the District where the employer resides or has his principal place of business. But the defendant in that case appeared specially and moved that the action be dismissed on the ground of lack of jurisdiction. In other words the defendant in that case elected to insist upon its privilege, and did not consent to waive it by appearing generally and failing to object. That case is plainly distinguishable from the case now before the Court.

In *Barrington v. Pacific S. S. Co.* 282 Fed. 900 the provision in the Jones Act was construed differently in the District Court of the State of Oregon. In that case it was decided that no other court has jurisdiction of a suit brought under the Act except the court of the district in which the defendant resided or in which his principal office is located. And in reaching its conclusion the court attached much importance to the word shall and thought it showed an intent to constitute the court in all such actions a court of special and not general jurisdiction. The court said: "The mandatory language of the Statute indicates as much. Mark the language: 'Jurisdiction in such actions shall be under the court of the district,' &c." We are unable to concur in the conclusion reached in the Oregon case, and we are unable to see why the word "shall" as found in the Jones Act should have any greater significance than the Supreme Court has attached to the same word as found in Section 51 of the Judicial Code.

We think that the District Court for the Eastern District of New York had jurisdiction of this action although it was not brought in the District in which the defendant resides or in which its principal office is located, the defendant having waived its privilege of requiring the suit to be brought in the District of its residence by not having appeared specially and objected to the jurisdiction. We see no reason, therefore, why the opinion of this court previously rendered, affirming the judgment below, should be set aside.

[File endorsement omitted.]

[Title omitted]

PETITION FOR WRIT OF ERROR

Your petitioner, Panama Railroad Company, plaintiff in error in the above-entitled cause, respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Second Circuit, and that a judgment was therein rendered on the 11th day of May, 1923, affirming a judgment of the District Court of the United States for the Eastern District of New York, and that the matter in controversy in said suit exceeds one thousand dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different states, and that this cause does not arise under the patent laws, and that it is not an admiralty case, or a cause arising under Acts of Congress relating to the liability of common carriers to railroad employees, or to promote the safety of employees and travelers, or with respect to providing common carriers engaged in interstate commerce with safety devices, or any amendment thereto, but is a cause arising under Section 33 of the Act of Congress of June 5th, Chap. 250, 41 U. S. Stats. 1607, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; and therefore your petitioner would respectfully pray that a writ of error be allowed it in the above-entitled cause directing the clerk of the United States Circuit Court of Appeals for the Second Circuit to send the record and proceedings in said cause with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said plaintiff-in-error may be reviewed, and if error be found, corrected according to the laws and customs of the United States; and that all proceedings herein including the issuance of mandate upon the said judgment rendered May 11th, 1923, be stayed pending decision by the Supreme Court of the United States upon such writ of error.

Panama Railroad Company, Plaintiff-in-Error. By Richard Reid Rogers, Its Attorney, Office & P. O. Address No. 63 Wall Street, Borough of Manhattan, New York City.

ORDER ALLOWING WRIT OF ERROR—Filed May 28, 1923

The foregoing petition is granted and writ of error allowed as prayed for upon plaintiff giving bond according to law in the sum of \$13,500, and all proceedings herein, including the issuance of mandate upon the judgment of this Court rendered May 14th, 1923, are stayed pending decision by the Supreme Court of the United States upon said writ of error.

Henry Wade Rogers, U. S. C. J.

[File endorsement omitted.]

[Title omitted]

ASSIGNMENT OF ERRORS

And now comes the plaintiff-in-error, Panama Railroad Company, by Richard Reid Rogers, its attorney, and says that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Second Circuit, in the above-entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff-in-error to this, to wit:

First, Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States for the Eastern District of New York for ten thousand dollars (\$10,000.00) and costs of suit, entered on January 11th, 1922, in favor of said defendant-in-error and against said plaintiff-in-error.

Second, Said Circuit Court of Appeals erred in not dismissing the said cause upon the ground that Section 33 of the Act of Congress of June 5th, 1920, c. 250, 41 Stat. 1007 is unconstitutional because in violation of Section 2 of Article 3, and the Fifth Amendment of the Constitution of the United States.

Third, Said Circuit Court of Appeals error in not dismissing the cause upon the ground that the same was not brought in the district wherein the plaintiff-in-error had its principal place of business.

Fourth, Said Circuit Court of Appeals erred in not holding Section 33 of the Act of June 5th, 1920, c. 250, 41 Stat. 1007 without force and effect and unconstitutional because so vague, indefinite and uncertain as to make it difficult or impossible to comply with its provisions and to deny to the defendant due process of law.

Fifth, Said Circuit Court of Appeals erred in not sustaining the "First" assignment of error upon the record of said cause.

Sixth, Said Circuit Court of Appeals erred in not sustaining the "Third" assignment of error upon the record of said cause.

Seventh. Said Circuit Court of Appeals erred in not sustaining the "Fifth" assignment of error upon the record of said cause.

Eighth. Said Circuit Court of Appeals erred in not sustaining the "Sixth" assignment of error upon the record of said cause.

Ninth. Said Circuit Court of Appeals erred in not sustaining the "Eighth" assignment of error upon the record of said cause.

Tenth. Said Circuit Court of Appeals erred in not sustaining the "Tenth" assignment of error upon the record of said cause.

Wherefore, the said Panama Railroad Company, plaintiff-in-error, prays, that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above-entitled cause to the prejudice of the plaintiff-in-error the said judgment of the said United States District Court of Appeals be reversed, annulled, and for naught esteemed, and that said cause be remanded to the United States Circuit Court for the Eastern District of New York with instructions to grant a new trial in said cause, or for such further proceedings in said cause as may be determined upon by this honorable court, to the end that justice may be done in the premises.

Richard Reid Rogers, Attorney for Plaintiff-in-error.

[File endorsement omitted.]

BOND FOR \$13,500 FOR DAMAGES & COSTS—Filed May 28, 1923
(omitted in printing)

[File endorsement omitted.]

CLERK'S CERTIFICATE—Filed June 1, 1923

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 229 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Panama Railroad Company, Plaintiff in Error, against Andrew Johnson, defendant in Error, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 1st day of June in the year of our Lord One Thousand Nine Hundred and twenty three and of the Independence of the United States the One Hundred and forty seventh.

Wm. Parkin, Clerk. (Seal of the United States Circuit Court of Appeals, Second Circuit.)

CITATION AND SERVICE—Filed May 28, 1923

UNITED STATES OF AMERICA, ss:

The President of the United States to Andrew Johnson, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States Circuit Court of Appeals for the Second Circuit, wherein Panama Rail Road Company, is plaintiff-in-error and you are defendant-in-error, to show cause, if any there be, why judgment rendered against the said plaintiff-in-error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry Wade Rogers, Justice of the United States Circuit Court of Appeals for the Second Circuit, this 28th day of May, in the year of our Lord one thousand nine hundred and twenty-three.

Henry Wade Rogers,

Service admitted, this 28th day of May, 1923.

Silas B. Axtell, Attorney for Andrew Johnson, Defendant-in-error.

[File endorsement omitted.]

Endorsed on cover: File No. 29,679 U. S. Circuit Court of Appeals, Second Circuit. Term No. 369. Panama Railroad Company, plaintiff in error, vs. Andrew Johnson. Filed June 13th, 1923. File No. 29,679.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1923.

No. 369.

PANAMA RAIL ROAD COMPANY,
Plaintiff-in-Error,

against

ANDREW JOHNSON,
Defendant-in-Error.

**BRIEF ON BEHALF OF
PETITIONER.**

This case is here on a writ of error issued out of the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court affirming a judgment of the United States District Court for the Eastern District of New York sitting on the common law side. As the case is not dependent upon diverse citizenship of the parties, nor an admiralty case, nor a case arising under the acts of Congress relating to the liability of common carriers to railroad employees, the writ of error would seem to lie. If there be any

doubt upon this point, which we understand is not contested, it is proper to point out that an application for a writ of certiorari to the Circuit Court of Appeals is pending before this Court, and that action on this application has been postponed by an order of this Court until the hearing on the writ of error.

The case involves primarily the constitutionality and application of Section 33 of the Act of June 5, 1920, c. 250, 41 U. S. Stats., p. 1007, commonly known as the Jones Act, amending Section 20 of the Seamen's Act, and reading as follows:

"Sec. 33. That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:

'Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.'"

The Facts.

The plaintiff was quartermaster upon the steamship "Allianca" of the Panama Rail Road Company, and had served in that capacity for seventeen months. As the ship was descending the Guayaquil River in Ecuador he was engaged in casting the lead for soundings. When the ship reached deep water near the mouth of the river, the officer of the deck instructed him to put away the lead and go below. The sounding apparatus consisted of a fourteen-pound weight, to which was attached approximately thirty fathoms of three-quarter inch casting line (fols. 59, 60); and was regularly kept in a locker upon the bridge deck near the head of the main companionway. There were three approaches to this locker which the plaintiff was at liberty to use. First, the main companionway, leading from the saloon deck to the bridge deck. Second, one of two ladders upon the port and starboard sides of the vessel to the rear of the companionway—these ladders projected above the main deck terminating in a goose-neck arrangement, and this was the way habitually taken by the fellow quartermaster of the plaintiff, Nelson. Third, the emergency ladder leading from the main deck to the bridge deck, attached to the front of the bridge.

According to plaintiff, in putting away the lead and line, he first designed to use the companionway, a way which he had employed before (fols. 113, 244, 307), but he says that at the companionway he was told by the steward to walk the other way; that he communicated this fact to the officer on the bridge, and that the latter told him to come

up the bridge ladder. It is really doubtful whether the plaintiff attempted to use the companionway at all. He is contradicted upon this point by his own witness, Robert Nelson, who says that immediately after Johnson was told to put away the lead, he proceeded up the bridge ladder (fol. 480); but the point is not of controlling importance, inasmuch as both Johnson and the other witnesses agree that the mate had previously instructed the steward to allow the companionway to be used by the quartermasters when the weather was rough, and according to Johnson's testimony such was the state of the weather at the time the lead was put away. The steward, moreover, had no authority to override the officers in the management of the crew, and no member of the crew would have been obliged to pay the slightest attention to him if he had so attempted. What the plaintiff's real rights were was plainly brought out by his own witness, John Sargent, another quartermaster, who said: "Myself, I would not climb over the ladder with a dodger there; I would have gone around through the passageway into the saloon regardless of the steward's orders" (fol. 222). But throwing out the companionway entirely, no adequate reason was shown why the plaintiff still might not have used one of the ladders to the rear of the passageway, with which he was familiar, and which were habitually used by Nelson, one of the other quartermasters, and Michelson (fols. 346, 493). These ladders as previously stated projected above the floor of the deck, and were no doubt safer to use than the bridge ladder, which was attached to the front of the bridge and could not well arise above its level without interfering with the normal operations upon the bridge. Johnson's excuse for not using this lad-

der was that ropes and other objects were lying upon the deck leading from this portion of the ship to the locker. This was plainly an afterthought of his, but even if so, it presented no serious difficulty to the use of the ladders in the rear which his fellow quartermaster habitually used. Now, the bridge ladder was a perpendicular ladder, in sound condition, the stanchions reaching a point twelve inches below the bridge rail (fol. 193), and was such a ladder, according to the uncontradicted evidence, as was in customary use, and was also one which had been used without serious accident theretofore (plaintiff's own witnesses, fols. 217, 229, 236; defendant's witnesses, fols. 348, 385). At the top of the bridge ladder, according to the plaintiff, there was stretched across the bridge a canvass dodger. This was obvious to him from the place where he made soundings, and he knew its position when he began the ascent of the ladder. According to his testimony this dodger was stretched at a height of about twenty inches above the bridge rail (fol. 128). According to his witness, Nelson, it lay loosely across the bridge rail, and could be pressed down to the rail with the hand (fol. 485). According to the officer it was tied to the bridge rail at this point (fols. 341, 406). However that may be, the plaintiff's own testimony shows that the accident was solely due to his own negligence. His testimony on this point was as follows:

"Q. So that you had got to the top of the ladder and your right foot was on this round and you were lifting your left leg to step over and you had hold of the weather cloth with your right hand and your left hand was on top of the weather cloth? A. Yes.

Q. You had no grip on anything except the weather cloth? A. No, nothing else."

Johnson was a large portly man, and his accident occurred by his missing his step in some way in climbing this ladder. He fell to the deck and fractured his leg and received injuries for which the jury awarded him under the charge of the Court the sum of \$10,000 as damages.

The Trial Judge having reached the conclusion, under the language of the Jones Act, which provides that where a seaman elects an action at law and a trial by jury "all statutes of the United States modifying or extending the common law right or remedy in cases of personal injuries to railway employees shall apply," that the case must be submitted to the jury as though it were one arising under the Federal Railroad Employers' Liability Act, recapitulated that act to the jury, and thus eliminated from their consideration all question of seaworthiness, the plaintiff's own negligence except in a comparative sense, the defense that the injuries might have been the result of negligence of his co-employees upon the ship, and the plaintiff's own assumption of risk; and left it broadly to the jury, under the language of the act, as read, to decide whether in their opinion the ladder (irrespective of the fact that it was one customarily employed under similar circumstances) was adequate and sufficient. The learned Judge made his purpose very clear, as appears from his concluding language (fol. 458):

"The law should be applied just as I have given it to you and as I have read it from the book; and I will allow an exception."

In view of the fact that the Trial Judge eliminated the question of seaworthiness of the ladder and appliances, it is difficult to understand the real theory upon which the case was submitted to the jury: apparently upon the theory that the bridge ladder in connection with the canvas dodger was a less safe manner of putting away the lead than either the use of the companionway, or the gooseneck ladders to the rear; that the plaintiff, if his testimony were to be believed, was prevented from using the companionway by the action of the steward; and that he could not be held to have assumed the risk of the bridge ladder in view of the authorization of the bridge officer to use that particular way. The fact that, assuming all this to be true, the plaintiff could have used the gooseneck ladders to the rear of the companionway, which were habitually used by his fellow quartermasters, was disregarded. The Court certainly did not submit the case upon the theory that the ladder was unseaworthy. A request of plaintiff's counsel to this effect was refused, the Court stating that he based the plaintiff's rights entirely upon the statutes—that is to say the Federal Employers' Liability Statutes (fols. 450, 451).

The Court, it will be observed, submitted the case upon the theory that the Jones Act was absolutely valid, and that the case must be decided by the jury, not under the principles of the maritime law but under the common law principles as modified by the Railroad Employers' Liability Act. This leads directly to the consideration of the constitutionality of the act in question.

Specification of Errors.

1. The Circuit Court of Appeals erred in not holding that the case should have been dismissed upon the ground that Section 33 of the Act of Congress of June 5th, 1920, c. 250, 41 Stat. 1007 (the Jones Act), was unconstitutional because destructive of the maritime jurisdiction guaranteed by Section 2 of Article 3 of the Constitution (Second Assignment of Error, p. 203; Brief, Point I).

2. The Circuit Court of Appeals erred in not holding the Jones Act unconstitutional upon the ground that it denies due process of law under the Fifth Amendment; first, because it arbitrarily discriminates in favor of the seaman, and withholds from the shipowner the benefit of a new process of law created by the Act (Second Assignment of Error, p. 203; Brief, Point II); and second, because the Act is so vague and indefinite as not to constitute due process of law (Second Assignment of Error, Brief, Point III).

3. The Circuit Court of Appeals erred in not dismissing the cause upon the ground that it was not brought in the district wherein the plaintiff-in-error had its principal place of business (Third Assignment of Error, Brief, Point IV).

4. The Circuit Court of Appeals erred in not holding that the case should have been dismissed upon the ground that there was no legal evidence of negligence upon the part of the defendant (Fifth Assignment of Error, pp. 203 and 173; Brief, Point IV).

5. The District Court erred in refusing to charge the jury, at the defendant's request, as follows:

"I will ask your Honor to charge the jury that if the plaintiff knew, as he should have known, the character of the ladder, and used it upon the bridge from time to time, then he assumed the risk of any accident which happened to him in using that ladder under the conditions" (Seventh Assignment of Error, pp. 204 and 523).

And in further refusing to charge, at the defendant's request, "that the assumption of risk is an absolute defense" (Eighth Assignment of Error, pp. 204, 175 and 154; Brief, Point VI).

POINT I.

The Jones Act is unconstitutional inasmuch as it is destructive of the admiralty and maritime jurisdiction of the Courts of the United States guaranteed by Section 2, Article III of the Constitution.

At the outset it may be well to consider the fundamental differences between the maritime law regulating the relations between seamen and ship-owner, and the common law regulating the relations between employer and employee as modified by the statutes of the United States relating to railroad employees. The rights of seamen against the ship-owner with respect to injuries sustained while in the service are well settled by the maritime law. They have remained virtually unchanged since the laws of Oleron, which provide (Article VI) "that

if a seaman in service of the ship happens to become wounded or otherwise hurt; in that case he shall be cured and provided for at the cost and charge of the said ship"; and (Article VII) "that if sick he is to be set ashore and receive wages if the ship departs." As more specifically defined in the case of *The Osceola*, 189 U. S. 158, they consist of a right to wages for the voyage and maintenance and cure, irrespective of fault on the part of the seaman; but to indemnity only in case of unseaworthiness or negligent medical treatment. The shipowner is not responsible for injuries to a seaman occasioned by the negligence of members of the crew, or ship's officers.

Under the railroad law there is of course no continuing obligation to pay wages or maintain and cure the employee, irrespective of the employer's fault; but upon the other hand the employer is responsible for the negligence of co-employees. There are other differences, as for example, the doctrine of comparative negligence, the non-assumption of the risk of appliances which fail to comply with statutory requirements, and the inability of the employer to limit his risk.

As the legal rights of the seaman under the Jones Act were construed below, the seaman alone is given the privilege of proceeding in admiralty for maintenance and cure if his case be one which would not justify a recovery under the railroad law, or upon the other hand, if his case be one which would not justify a recovery outside of maintenance and cure under the maritime law of suing for full indemnity under the common law as modified by the railroad law; as, to illustrate, where his injuries are due to the negligence of a co-employee. In other words, one party to a maritime contract

or arrangement is given the right under the act in question of taking his case wholly from without the jurisdiction and principles of the maritime law, and of transferring it to the jurisdiction of a common law court there to be decided under the principles of common law as modified or extended in the irrelevant field of railroad legislation. It is believed, therefore, that this act is destructive of the maritime law, and of the constitutional jurisdiction of the courts of the United States with respect thereto.

As to the right of Congress to directly amend the maritime law, there can be no reasonable question. It is not contended that the constitutional provision that the judicial power shall extend to all cases of admiralty or maritime jurisdiction by implication creates a whole code for master and servant at sea that can be modified only by a constitutional amendment. See opinion of Mr. Justice Holmes in his dissenting opinion in *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 167; *The Lottawanna*, 21 Wallace 558.

But conceding that Congress may amend the maritime law by modifying the principle of *The Osceola* case to the extent of holding the shipowner responsible for injuries received by one seaman through the negligence of another, nevertheless in such a case it would be the maritime law itself, that was modified or amended. Under the Jones Act, however, the maritime law is not directly amended, but a cause of action essentially maritime in its nature is bodily removed, or at the election of one of the parties, may be removed to a common law court, there to be decided, not according to maritime principles, but according to the very different common

law principles, as modified or extended, in the case of personal injuries to railway employees.

It must readily be seen that if Congress can take a cause of action essentially maritime in its nature and provide that such cause of action shall no longer be dealt with according to the principles of maritime law, but according to the principles of the common law, it could in the end destroy the entire constitutional jurisdiction of the courts of the United States over maritime causes of action. If Congress can authorize one party litigant to a cause of action to remove his cause from the jurisdiction and principles of the maritime law, and have it treated according to the conflicting principles and rights of the common law, it could undoubtedly do the same thing directly without extending an election to the litigant. In other words, Congress could provide that in all cases of injuries sustained by seamen, such cause of action should thereafter be tried in common law courts, according to common law principles, and there is no reason why it could not further provide that such causes could be tried according to common law principles in the courts of the several states. This is no more than has been often done under the saving clause, under which it is held that the common law is competent to administer a remedy in practically all cases arising under the maritime law, except where the proceeding is *in rem* (*New Jersey Steam Navigation Co. v. Merchants Bank*, 6 Howard 377, 390). It is well known that the common law affords a remedy in cases of collision, salvage, bills of lading, marine insurance, charter parties, damage to ship's cargo, and there is no very good reason why the common law might not be amended so as to authorize a proceeding *in rem*.

A qualified proceeding *in rem* is recognized in cases of foreign attachments, and in litigation with respect to real property. Why should not the common law be amended so as to provide in the case of damage by a vehicle, for example, a litigant might proceed against the *res*, allowing the claimant to appear and defend? Thus it will be seen that if Congress can provide that the cause of a seaman injured in the course of his employment shall hereafter be tried in the common law courts, including in this statement the common law courts of the several states, according to common law rights and principles, it can by parity of reasoning transfer to common law jurisdiction substantially every cause of maritime jurisdiction heretofore recognized as falling within the scope of the admiralty law.

In the particular act under discussion, it will be observed that what is given is not a mere procedural privilege to a seaman to prosecute a maritime cause of action in a common law court, but a right to transfer a maritime cause of action to the common law court, there to be adjudicated according to the principles of the common law as amended. The act distinctly says that the seaman at his election may maintain an action for damages at law with a right of trial by jury, and that in such action all statutes of the United States modifying or extending the common law *right*, as well as remedy, in the case of personal injury to railway employees shall apply.

This is going far beyond anything that has been heretofore approved. Heretofore, under the saving clause of the Judiciary Act of 1789 now Judicial Code, Section 256, maritime rights could be prosecuted in common law courts where the common law gave an adequate remedy, but once there the liti-

gant's rights would still be adjudicated according to the principles of the maritime law (*Carlisle Packing Co. v. Sandanger*, 259 U. S. 255, 259; *Che-lentis v. Luckenbach S.S. Co.*, 247 U. S. 372, 380; *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 159); but under this act a common law procedure is not only authorized, but maritime rights are disregarded, and the very opposite common law rights or statutory modifications thereof, substituted in their place.

Now, it is believed, that the Constitution is sufficiently broad to prevent the destruction in whole or in part of the maritime law and the jurisdiction of the Courts of the United States with respect thereto.

In *The Lottawanna*, 21 Wallace 558, the Supreme Court said :

"That we have a maritime law of our own operative throughout the United States cannot be doubted. * * * The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime Jurisdiction.' "

In *The St. Lawrence*, 1 Black 522, 526, it was declared by Chief Justice Taney, speaking of the admiralty jurisdiction :

"Certainly no state law could enlarge it, nor could an Act of Congress or a rule of court make it broader than the judicial power may determine to be its true limits."

And in *The Lottawanna*, 21 Wallace, at page 576, Justice Bradley declared

“the question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no State law or act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be.”

In *Butler v. Boston Steamship Co.*, 130 U. S. 527, 557, the doctrine of *The St. Lawrence* and *The Lottawanna* cases as above quoted, was again approved.

Similarly in *The Blackheath*, 195 U. S. 361, 365, it was declared that Congress “cannot enlarge the constitutional grant of power,” and again in the same case, Mr. Justice Brown concurring, declared to the same effect that Congress could not extend our admiralty jurisdiction. As observed by Justice Bradley in *The Lottawanna* case, if it cannot make it broader, Congress cannot under the Constitution make it narrower.

The jurisdiction of the courts of the United States in maritime matters is exclusive. It was so provided in the original Judiciary Act of 1789, and this provision is continued into Section 256 of the Judicial Code, there being saved under both the common law remedy where the common law is competent to give it.

In *The Moses Taylor*, 4 Wall. 411, 429, the exclusive jurisdiction of the Federal courts in maritime cases was declared. The language of Justice Field, delivering the unanimous opinion of the court in that regard, was as follows:

"The Judiciary Act of 1789, in its distribution of jurisdiction to the several Federal courts, recognizes and is framed upon the theory that in all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the Federal courts. It declares that in some cases, from their commencement, such jurisdiction shall be exclusive; in other cases it determines at what stage of procedure such jurisdiction shall attach, and how long and how far concurrent jurisdiction shall attach, and how long and how far concurrent jurisdiction of the State courts shall be permitted. Thus, cases in which the United States are parties, civil causes of admiralty and maritime jurisdiction, and cases against consuls and vice-consuls, except for certain offences, are placed, from their commencement, exclusively under the cognizance of the Federal courts."

It might be said that this decision refers to an exclusive jurisdiction established by Congress; but other cases treat the exclusive jurisdiction of maritime causes by the United States Courts as constitutional.

In the great case of *Martin v. Hunter's Lessee*, 1 Wheat. 304, this Court through Justice Story analyzed the maritime jurisdiction of the Courts of the United States under Section 2 of Article III with great detail and powerful logic. With respect to the introductory words "the judicial power shall extend" the opinion reached the conclusion that these words were used in an "imperative sense," and that they imparted an absolute grant of judicial power (p. 331). Justice Story then proceeded to classify the judicial powers conferred by the Constitution upon the Courts of the United

States. He observed that the first class includes cases arising under the Constitution, treaties and laws of the United States, cases affecting ambassadors, and cases of admiralty and maritime jurisdiction. This class is preceded by the word "all." As to the second class, including all other cases of national cognizance, as where the jurisdiction is dependent upon the character of the parties, the word "all" is dropped seemingly, he says, *ex industria*. It is hardly to be presumed that the variation in language could have been accidental. Hence he concludes that it may have been the intention to imperatively extend the judicial power to all cases of the first class, and as to the second class to leave Congress to qualify the jurisdiction in such manner as public policy might dictate. The vital importance of the cases of the first class is then alluded to as follows:

"In the first place, as to cases arising under the constitution, laws, and treaties of the United States. Here the state courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts previous to the adoption of the constitution, and it could not afterwards be directly conferred on them; for the constitution expressly requires the judicial power to be vested in courts ordained and established by the United States. This class of cases would embrace civil as well as criminal jurisdiction, and effect not only our internal policy, but our foreign relations. It would, therefore, be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety. The same remarks may be urged as to cases affecting ambassadors,

other public ministers, and consuls, who are emphatically placed under the guardianship of the law of nations; and as to cases of admiralty and maritime jurisdiction, the admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested; it embraces also maritime torts, contracts, and offences, in which the principles of the law and comity of nations often form an essential inquiry. All these cases, then, enter into the national policy, affect the national rights, and may compromise the national sovereignty."

Without altogether resting the decision of the Court upon the foregoing grounds he concludes:

"no part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to the state tribunals; the admiralty and maritime jurisdiction is of the same exclusive jurisdiction."

In *Clafin v. Houseman, Assignee*, 93 U. S. 130, it was observed that Congress had not always observed the distinction between those cases of federal jurisdiction where the word "all" precedes the grant, and those cases where it is omitted.

But in *Stevenson v. Fain*, 195 U. S. 167, the argument of *Martin v. Hunter*, was applied to those cases put in the second class by Justice Story, where the word "all" was omitted, and the word "controversies" substituted for "cases." The Court said:

"The use of the word 'controversies,' as in contradistinction to the word 'cases,' and the omission of the word 'all' in respect of controversies, left it to Congress to define the controversies over which the courts it

was empowered to ordain and establish might exercise jurisdiction, and the manner in which it was to be done."

The necessary converse of this declaration is, of course, that in the class of causes where the word "all" is used, and the word "cases" takes the place of "controversies," Congress is not authorized to define controversies over which it may exercise jurisdiction and the manner in which it is done. In this connection see the interesting reasoning of District Judge Ervin in the recent case of *Farrell v. Waterman S.S. Co.*, 291 Fed. Rep. 604.

Again in *Butler v. Boston Steamboat Co.*, 130 U. S. 527, the admiralty and maritime jurisdiction was held to be exclusive. See also *Southern Pacific v. Jensen*, 244 U. S. 205, 218.

The distinction considered under this general head was alluded to in the case of *Chelentis v. Luckenbach S.S. Co.*, 247 U. S. 372, 385, where this Court said:

"The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. Bouvier's law Dictionary. Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's

rights were those recognized by the law of the sea."

In *Hanrahan v. Pacific Transport Co.*, 262 Fed. 951, 952, the Circuit Court of Appeals for the Second Circuit, by Judge Hough, said that the maritime law is a different system of jurisprudence from the common law, and neither subordinated to nor controlled thereby, and that a choice of common law remedy by either party neither changed the maritime rights of the parties, nor created a new right.

The difference between the creation of a right and the exercise of remedies under the saving clause is well set forth in the case of *Suddens & Christenson v. Ind. Acc. Com.*, 182 Cal. 437, 439, cited in *Knickerbocker Ice Co. v. Stewart*. In that case the California court was dealing with the same question as was disposed of in the *Knickerbocker Ice Co.* case, namely, the validity of the Act of Congress that saved to claimants the rights and remedies under the Workmen's Compensation Law of any state. The Supreme Court of California said:

"On behalf of respondents, the suggestion is made that the numerous decisions upholding the constitutionality of the old 'saving to suitors' clause of the judicial code foreclose all discussion in the instant case, for the reason that the present amendment is merely an expansion of that clause. The difficulty with this reasoning lies in the fact that the original 'saving clause' saved *remedies* only, whereas the amended clause saves not only remedies but *rights* as well. Under the original clause, the substantive law wherever administered, was for maritime cases the law of the sea (*Chelentis v. Luck-*

enbach S. S. Co., 247 U. S. 372). The old 'saving clause' did not, therefore, interfere with the uniform and harmonious operation of the maritime law, and, consequently, it did not violate the Constitution. It by no means follows, however, that the same may be said of the clause as expanded saving the claimants *rights* and remedies under the Workman's Compensation Law of any state."

The argument against the statute is based not upon the lack of power of Congress to amend the maritime law, nor upon its lack of power to authorize a maritime right to be prosecuted in the common law courts, state or federal, but upon the right of Congress under the constitution to destroy the substantive maritime law by substituting therefor the entirely distinct code of common law.

If the Jones Act be valid, it may be truly said that the judicial power of the United States no longer extends to *all* causes of admiralty and maritime jurisdiction, inasmuch as Congress has put it into the power of a seaman in a cause of action purely maritime in its nature, to take the case from out the jurisdiction of that law—the substantive law regulating his rights—and have it tried according to the principles of an entirely different system of law, in no sense maritime, and where the rights are quite diverse. It should be borne in mind that the state courts have assumed jurisdiction of seamen's actions brought under the Jones Act, *Lynott v. Great Lakes Trans. Co.*, 202 N. Y. App. Div. 613, affirmed without opinion by the Court of Appeals, State of New York, 234 N. Y. 626.

Whether the state courts are right in this assumption of jurisdiction is another question, but it is assumed that if Congress has not in fact conferred jurisdiction upon the state courts under the Jones Act by analogy to the saving clause of the Act of 1789, it at least has the power to do so. If there is reserved to the state courts under the Jones Act the privileged right to try a maritime cause according to the common law principles, then there will be inevitably destroyed that harmony and uniformity of the maritime law which this Court in *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, at page 164, "the Constitution not only contemplated but actually established."

POINT II.

The Jones Act is in conflict with the Fifth Amendment.

The arbitrary and irrational discrimination carried by this law is apparent upon its face. One party to a contract of marine employment, that is to say the seaman, is alone given the sole privilege of deciding when injuries are received, whether his cause shall be prosecuted under the maritime law, or under the entirely different and in some respects conflicting provisions of the common law as extended or modified by the statutes of the United States affecting railway employees. If the seaman is injured solely by his own fault, and hence in a manner which would entitle him to nothing under the common law, he can still proceed in admiralty, and recover his wages for the round voyage and maintenance and cure, or "care" (see

Bouker No. 2, 241 Fed. Rep. 831, 835) for a reasonable period beyond the termination of his voyage. If upon the other hand, his injuries are received as a result of the negligence of another member of the crew, where he would have no right of recovery beyond maintenance and cure under the maritime law, he can proceed under the Jones Act (if the act be valid), and recover a full indemnity. No corresponding right or privilege is extended to the other party to the seaman's contract, namely, the shipowner. The shipowner must pay pursuant to the principles of the maritime law if the seaman invokes the jurisdiction of admiralty. He must likewise pay, although he would not be responsible under the maritime law, should the seaman under this Act proceed to assert his rights under the common law as amended by the Railroad Law. The Act does not amend the maritime law so that it applies equally in all cases to both seamen and to shipowner; it leaves that law intact, but extends to the seaman a new process at law—that is to say, the privilege of having his case treated under the common law principles as modified by federal statutes, his damages to be assessed by a jury rather than by the court itself, either in the common law courts of the United States or common law courts of the several states.

If a privilege is to be given to one party litigant, to wit, the plaintiff, to try his cause of action under either one of two diverse systems of law, where not only the remedies but the rights are different, no sound reasoning can be advanced why a similar privilege should not be extended to the party defendant. If the maritime law had been amended

by introducing some modification of that law, as for example the modification that the shipowner should be responsible in event of injuries inflicted upon a member of the crew through the negligence of another member of the crew, the law would have been uniform with respect to both parties, but in this act there is really no amendment of the admiralty law, but as argued under the preceding head, a transfer of a maritime cause of action from out the reach of admiralty into the common law courts there to be decided according to the different principles of common law as amended by federal statutes. The law which regulates the duties and relations of seamen and owner in case of personal injury to the seamen no longer remain fixed by a definite code, but fluctuate according to the election of single party litigant as to whether his cause of action shall be tried under one system of law, or under another and diverse system. If instead of legislating wholly in favor of the seaman, Congress had provided that in all cases where a seaman was injured the shipowner alone should have the privilege of having the seaman's cause of action tried and decided by that system of law which would inure most to his advantage, the gross inequality of the law would have perhaps been more apparent, but would not have been essentially different from that actually presented by the provisions of this act.

The law is confined to seaman alone, and does not protect any other class of employees engaged in the service of the ship, as for example, stevedores. It is possibly within the power of Congress to segregate seamen into classes by themselves, extending to them privileges which are not extended

to stevedores, or other employees engaged in a maritime venture; but this is not the arbitrary classification to which reference is made. There may be some ground for placing those members of the crew who actually go to sea in a class by themselves, but there can be no logical ground, of public policy or otherwise, in inaugurating a new process of law and extending that process to the seaman, and withholding it from the seaman's employer. The law is obscure on one point, whether if the seaman goes into common law court, he can carry with him his rights under the maritime law, and at the same time assert the additional rights given under the common law as amended by the Railroad Law. It would seem from the language of the statute that if he proceeds in the common law court his rights would be common law rights as modified or extended by the railroad legislation, and not otherwise; but even if it be conceded that once in the common law court he can assert not only common law rights, but rights under the maritime law as well, thus mixing the two separate codes of jurisprudence together in a single action, that fact does not affect the argument that no such corresponding privilege is extended the shipowner, although the rights and defenses of the shipowner and seaman necessarily arise out of the same transaction.

In all cases of classification which have come before this Court, where the classification has been sustained as not violating the fundamental principle of equality guaranteed by the Constitution, there has been some rational justification for the classification upheld. It was found to be based either upon the police power as essential to the protection of the health and morals of the segre-

gated class, or upon some principle of law, such as the right of the state to impose conditions upon corporations as an incident to their privilege of doing business within the state, as in *Prudential Ins. Co. v. Check*, 259 U. S. 530, 544; but no such principles can be invoked in the present case. There is no question of public policy, or of health or morals, no corporate organization seeking a privilege to which may be attached a reasonable condition, nor other rational ground for supporting a distinction between fundamental rights extended to a party plaintiff, if a seaman, and withheld from a party defendant, who is or may be an individual shipowner.

To what extent does the Fifth Amendment protect citizens of the United States, and citizens of other states enjoying the privileges of our laws, against this form of arbitrary classification?

This Court has never defined to the full extent the protection afforded by the due process clause of the Fifth Amendment. As said by this Court in *Twining v. New Jersey*, 211 U. S. 78, at page 99:

"Few phrases of the law are so elusive of exact apprehension as this. Doubtless the difficulties of ascertaining its connotation have been increased in American jurisprudence, where it has been embodied in constitutions and put to new uses as a limit on legislative power. This court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion as in the course of the decisions of cases as they arise."

But certain principles have been settled which seem to be adequate to cover the present situation.

For example, due process of law is the exact equivalent of the words "law of the land," as contained in the Magna Charta, *id.*, p. 100, and its meaning is the same in the Fifth Amendment as in the Fourteenth, *id.*, p. 101.

In *Bank of Columbia v. Okely*, 4 Wh. 235, 244, the words due process of law were said to be "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." See also *Hurtado v. California*, 110 U. S. 516, 527; *Leeper v. Texas*, 139 U. S. 462, 468; *Scott v. McNeal*, 154 U. S. 34, 45.

In *Cotting v. Kansas City Stockyards Co.*, 183 U. S. 79, 105, the definition of Justice Catron, one of the most illustrious of Tennessee Judges, and subsequently a member of this Court, rendered before the Fourteenth Amendment, was approved:

"Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community who made the law by another" (*Vansant v. Wad-del*, 2 Yerger, 260, 270).

In the fourth edition of Mr. Justice Story's work upon the Constitution, Section 1944, which was drafted by Judge Cooley, the following is set forth:

"By the law of the land is most clearly intended the general law; a law which hears

before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."

This definition has been recently approved by this Court in *Truax v. Corrigan*, 257 U. S. 312, 332, which further expands the definition by adding the following language:

"It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty, and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law;' 'This is a government of laws and not of men'; 'No man is above the law,'—and all maxims showing the spirit in which legislatures, executives, and courts are expected to make, execute, and apply laws."

Again, in *Giozza v. Tiernan*, 148 U. S. 657, the Supreme Court said in referring to the due process expression in the Fourteenth Amendment:

"Due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

In *Leeper v. Texas*, 139 U. S. 462, it was declared:

"Due process was secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the pow-

ers of government unrestrained by the established principles of private right and distributive justice. *Hurtado v. California*, 110 U. S. 516, 535, and cases cited."

In *Brushaber v. Union Pac. R. R.*, 240 U. S. 1, 25, this Court declared, that a classification so wanting in basis as to produce a gross and patent inequality would be the equivalent of confiscation of property in violation of the Fifth Amendment.

The text writers on the Constitution have taken the position that due process prohibits arbitrary inequality.

In Willoughby on the Constitution, at page 874, it was said:

"One of the requirements of due process of law, as stated by the Supreme Court, is that the laws 'operate on all alike,' and do not subject the individual to an arbitrary exercise of the powers of government."

In McGee on Due Process of Law, page 60, it is said:

"Purely arbitrary decrees or enactments of the Legislature directed against individuals or classes are held not to be 'the law of the land,' or to conform to 'due process of law.'"

In the recent case of *Adkins v. Childrens Hospital*, Supreme Court Advance Opinions, pages 440, 443 (holding unconstitutional the Women's Minimum Wage Law), the principle of equality protected by the Fifth Amendment is extended to contracts between employer and employee, which are held to be protected by the Fifth Amendment.

Now, if the Fifth Amendment to the Constitution forbids Congress to pass laws which are arbitrary and unequal, a law which discriminates against one party to a contract in favor of another must certainly under the decisions of this Court be regarded as partial and unequal.

Adair v. United States, 208 U. S. 161, 174, and *Coppage v. Kansas*, 236 U. S. 1, 17, would seem to be conclusive on this point.

In *Adair v. United States*, it was held not to be within the power of Congress to make it a criminal offense for a carrier engaged in interstate commerce to discharge an employee because of membership in a labor organization, inasmuch as such a provision was an invasion of the personal liberty, as well as right of property guaranteed by the Fifth Amendment of the Constitution of the United States. Justice Harlan used the following language, at page 174:

"While, as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the em-

ployee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. It was the legal right of the defendant Adair—however unwise such a course might have been—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so—however unwise such a course on his part might have been—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. *In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.*" (Italics ours.)

In *Coppage v. Kansas*, 236 U. S. 1, 17, the point decided in *Adair v. United States* was re-examined. This Court referred to the elaborate argument and full consideration given to the question in that case, and reaffirmed its doctrine. In the *Coppage* case, this Court held unconstitutional a law of Kansas making it illegal for an employer to require an employee to agree not to become or remain a member of a labor organization during the time of his employment. In that case the right of liberty of contract was upheld, and it was said that an interference with this liberty so serious as that under consideration, and so disturbing of equality of right, must be deemed arbitrary, unless it be supported as a reasonable exercise of the police power of the state. See also *Yick Wo v. Hopkins*, 118 U. S. 356, 370.

And if a discrimination by law in favor of one party to a contract, as for example an employer or an employee, is an arbitrary discrimination which violates the Fifth Amendment, so likewise is a law which extends a special privilege to one party *litigant* as against the other. This principle was early settled in the case of *Martin v. Hunter's Lessee*, 1 Wheaton, at page 348, where Mr. Justice Story said:

"The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum. Yet, if the construction contended for be correct, it will follow, that as the plaintiff may always elect the state court, the defendant may be deprived of all the security which the constitution intended in aid of his rights. Such a state of things can, in no respect, be considered as giving equal rights."

POINT III.

The Jones Act is so vague and uncertain as not to constitute due process of law.

One of the Judges in the Circuit Court of Appeals (Judge Mayer) expressed a doubt as to the constitutionality of the act in so far as it incor-

porates other statutes not by specific reference but by general reference to statutes of the United States modifying or extending the common law right or remedy in cases of personal injuries to railway employees (Rec., p. 197).

As to the hasty and ill-considered character of legislation put forward by the Jones Act there can be no reasonable doubt. Notwithstanding that the maritime law of the Constitution is universally recognized as an independent code with rights and remedies peculiar to itself, that law must now fluctuate accordingly as Congress may hereafter legislate with respect to employers and employees in the entirely alien field of railroad employment. It is not to be presumed that in a matter of such universal interest as the relation of railroad employees to the railroads the law will remain unchanged; but from now on whenever Congress legislates upon that subject, it will unconsciously modify the maritime code as well. It will be observed that there is nothing in the Jones Act which limits the railroad legislation which affects the rights of seamen to the railroad legislation in force upon June 5, 1920, when the Jones law was enacted.

In *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 164, this Court said that the definite object of the grant of exclusive power over maritime matters was to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union; and that considering the fundamental purpose in view and the definite end for which such rules were ac-

cepted, it must be concluded that in their characteristic features and essential international and interstate relations, the maritime law "may not be repealed, amended or changed except by legislation which embodies both the will and deliberate judgment of Congress."

It may be said that this language was used in connection with the declared inability of Congress to delegate its power; but it is nevertheless appropriate to the present situation. Legislation by general reference to other laws is certainly not in accord with the trend of modern thought. It is condemned under the constitutional provisions of New Jersey, Pennsylvania and New York. In nearly all states Legislatures are forbidden to pass laws pertaining to more than one subject-matter, or whose subject is not expressed in the title of the act. These provisions are designed to prevent the evils of surreptitious legislation. It seems absurd that hereafter in so important a matter as admiralty and maritime jurisdiction, Congress may subject that jurisdiction to fundamental changes while legislating upon an alien subject which has no reference thereto. The majority of the Court of Appeals disregarded this point, because it was said that the Constitution of the United States contained no prohibition upon the subject. Upon the other hand, this is the first case, so far as we have been able to ascertain, which has ever arisen, where Congress has endeavored to legislate concerning a fundamental constitutional power, or indeed upon any other subject, by the vague and confusing method of adopting *in solido* the general law relating to an entirely separate branch of jurisprudence.

Reference is made to *The Binghamton Bridge* case, 3 Wallace 51, 79. Congress there was dealing not with national, but with state legislation. Two bridge companies in substantially the same situation were incorporated, and one by cross reference in the act of its incorporation was given the powers set forth in the charter of the other. The "like purposes" of the two corporations were referred to, and the object of this incorporation was said to be not to incumber the statute book by useless repetition and unnecessary verbiage. In that case there could be no question of confusion or vagueness, inasmuch as the two bridge companies were in the same category and the powers of one were defined to be precisely the same as those of the other. The reference was at least specific. The case is not an authority, however, for the Congress of the United States to do the same thing, and Congress, as said before, has never resorted to so confusing a practice. But even if so, the legislation thus incorporated by an act of Congress should at least be germane and susceptible of exact application. That, however, is not the situation in which the maritime law is left under the Jones Act. The Federal Employers' Liability Act was the only act considered by the District Court in submitting the case at bar to the jury, but the Jones Act itself carries no such limitation. It says that "all" statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply. But the Safety Appliance Act of March 2, 1893, 27 Stats. 531, the Boiler Inspection Act of February 17, 1911, 36 Stats. 913, Chap. 103, and the Hours of Service Act of March 4, 1907, 34 Stats. 1415, Chap. 2939, are

all statutes affecting the rights of railroad employers and their employees, and the language of the Jones Act is certainly broad enough to make all of these apply in the case where a seaman has sustained injury. Many of the provisions of these acts could have no conceivable application to the case of seamen. Others, as for example, the hours of service, might apply, but what does or does not apply must remain at the present time a matter of doubt, and neither the seaman nor the shipowner has any longer before him a definite standard of legal duty or liability.

Perhaps an even greater confusion will grow out of the application of the law of limited liability. Limited liability has always been a part of the general maritime law of other nations, but was not specifically introduced into the maritime code of the United States until the year 1851. It is now an established branch of our maritime law and rests upon the broad basis of public policy in the encouragement of investments in American shipping. What the Jones Act has done to this law no one yet knows. In a recent decision rendered in the District Court of the Southern District of New York by Judge Learned Hand (*El Mundo*, American maritime cases, April 15, 1923), he held that the case of an injured seaman could no longer be drawn into the general concourse by a limitation proceeding, inasmuch as such a proceeding would defeat the seaman's right of a trial by jury under the Jones Act. He even left it in doubt as to whether the shipowner under the Jones Act could limit his liability at all; but if so, it could only be done by pleading in the common law action as a special defense the existence of all other claims outstanding against the venture.

In *Southern Pac. Co. v. Jensen*, 244 U. S. 205, 218, in holding that the Compensation Law of New York was not applicable in the case of injuries to a maritime employee, this Court remarked that the remedy of that act was inconsistent with the policy of Congress to encourage investments in ships, which declare a limitation upon the liability of their owners.

Congress having introduced the principle of limited liability to encourage the construction of ships could no doubt change it; but it has not done so; and in adopting the Jones Act without a specific reference to this principle has thrown the law into a further state of great confusion.

It is a general rule of constitutional law that an act, whether state or national, which is so indefinite as to prescribe an obligation and set up no standard by which such obligation can be measured by court or jury, is invalid. It was upon this ground that the Lever Act in *United States v. Cohen Grocery Co.*, 255 U. S. 81, was held invalid.

In that case an act which made it unlawful for any person to make unjust or unreasonable rates or charges in handling the necessities of life, but prescribed no standard by which this rule could be applied, was set aside. That was a criminal case; but in *Standard C. & M. Corp. v. Waugh C. Corp.*, 231 N. Y. 51, the Court of Appeals of New York applied the principle in a civil proceeding as well.

The principle of these decisions has been applied in many other cases of which the following are illustrative:

L. & N. Railroad Co. v. Tennessee, 19 Fed. 679, holding that an act of Tennessee authorizing a suit for penalties where there was rate discrimination or unjust and unreasonable charges, and leaving those facts to be determined by a jury, without defining with reasonable certainty what was a fair and just return, was void for uncertainty.

Cook v. State, 26 Ind. 278, holding that an act penalizing the use of narrow tired wagons, and failing to define what was narrow tired, was void for the same reason.

Succession of Pizzali, 141 La. 647, holding void an act authorizing the adoption of minors without prescribing the means of adoption.

The submission of the case to the jury below affords a very concrete illustration of the vagueness of the Jones law. Notwithstanding the absence of any actual unseaworthiness in the ladder from which the plaintiff fell, the jury were virtually left to find a verdict accordingly as in their opinion the ladder might seem to be adequate or inadequate. It is true that the inadequacy of the ladder had to be coupled with the defendant's negligence; but if in the opinion of the jury the ladder was inadequate, they would necessarily reach a further conclusion that this was on account of negligence of the shipowner. To a landsman very few things about a ship might seem to be adequate. They might very well confuse safety with legal inadequacy, and on the speculative basis of personal opinion, as in fact they did here, bring in a verdict of liability against the shipowner. "It cannot be that the theory of the law requires it to be left to the uncertain judgment of the jury in every case" (*Southern Pacific Co. v. Berkshire*, 254 U. S. 415, 417).

POINT IV.

The District Court which tried the case was without jurisdiction.

The Jones Act provides that jurisdiction of actions brought under that statute "shall be under the court of the district in which the defendant employer resides, or in which his principal office is located." Defendant's principal office was in the Southern District of New York, and the action was brought in the Eastern District. An application before the trial was made to remove the case to the proper district, but not by special appearance (*Johnson v. Panama R. R. Co.*, 277 Fed. 859). The Circuit Court of Appeals on this point held that the subject-matter was one of which any district court would have original jurisdiction; that the district in which it was brought was a mere matter of venue, and that the improper venue was waived by the general appearance.

A contrary view of this act was taken by Judge Wolverton in *Barrington v. Pacific S.S. Co.*, 282 Fed. 900, and as his reasoning in that case fully covers our point, we quote from it as follows:

"Jurisdiction under the present statute is not founded upon diversity of citizenship, but upon the fact that the plaintiff is a seaman, and that, being a seaman, he is entitled to his action for personal injuries in a court having jurisdiction of the cause. The action is special to seamen, which creates a new remedy, and the court authorized to entertain jurisdiction of the cause is one specially designated. In the sense, therefore, in which it is so designated, it is constituted, for the purpose of actions by seamen for personal

injuries, a court of special, and not general, jurisdiction. The mandatory language of the statute indicates as much. Mark the language:

'Jurisdiction in such actions shall be under the court of the district,' etc.

So it would appear by usual interpretation that no other court has jurisdiction of the cause, except the court of the district in which the defendant employer resides or in which his principal office is located. There is a reason for this; the purpose obviously being to prevent seamen from suing the owners and lessees of vessels in any port of the country away from their residence or principal place of business. There can be no analogy to the statute where general jurisdiction is given on the ground of diversity of citizenship and the venue depends alone upon the residence of the parties. In this view, the case of *Ware-Kramer Tobacco Co. v. American Tobacco Co.* (C. C.), 178 Fed. 117, is without application, and I am unable to agree with its application in *Johnson v. Panama R. R. Co.* (D. C.), 277 Fed. 859."

If the matter is a mere question of venue, that is to say, of a personal privilege, no doubt the decision of the Circuit Court of Appeals is right. If, upon the other hand, which seems to be true, there is under the Jones Act, the creation of an entirely new remedy and the designation of a forum in which to try it, as was held in the *Barrington* case, the decision would seem to be wrong. The case here is perhaps analogous to *Thompson v. Whitman*, 18 Wall. 457, 470. There non-residents of New Jersey were prohibited by statute from gathering oysters and clams in that state, under penalty of seizure of their vessel. The justices of

the county where the seizure took place were given jurisdiction to determine the cause; and it was held that the justices of no other county had jurisdiction.

The foregoing points cover those of general interest. These remain, upon the assumption that the Jones Act is in all respects valid and the suit was brought in the proper district, errors in the submission of the case to the jury, and in the charge of the court.

POINT V.

The evidence did not establish legal negligence upon the part of the defendant, and the jury should have been instructed to find a verdict for the defendant.

The ladder itself was not defective. Moreover, it was a customary and usual type of ladder, and that being true, even under the railroad law, it was not negligence upon the part of the defendant to retain it. Even plaintiff's witnesses appear to admit that the ladder was one commonly employed upon many ships of the same construction as the "Allianca."

For example, John Sargeant testified for the plaintiff:

"You would not find many ships to-day with a ladder constructed like that. This is an old-fashioned ship. Most of the ladders that you find to-day are regular built ladders, a wooden ladder with a pipe rail

handle on either side; but I have seen a ship somewhat like this—this has got only one bridge, and I have seen ships with such a ladder having two bridges where this ladder would extend up to the upper bridge” (fols. 218, 219).

Again, George R. McNamee, another witness for the plaintiff, testified:

“Q. Have you seen any like this? A. Yes, I have seen them like this and I have seen them extend higher than that” (fol. 236).

Although this witness testified that he had seen ladders coming higher and bent over (fol. 245), he admitted that they were in the back part of the bridge. He also said that such construction on the front of the ship might interfere with the compass or with the vision (fol. 244). There does not seem here any evidence to meet the defendant's proofs that the ladder was of a type quite usual on similar ships (fols. 385 *et seq.* and fol. 348). The vessel had repeatedly passed steamboat inspection, which considers both safety of passengers and crew, and which covered this ladder (fol. 388). Plaintiff's case apparently rested on the assumption that a better form or type of ladder might have been employed. But proof of this character would not establish unseaworthiness.

In *Washington & Georgetown Railroad v. McDade*, 135 U. S. 554, 570, the Supreme Court said:

“Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of

their employes. Nor are they bound to supply the best and safest or newest of these appliances for the purpose of securing the safety of those who are thus employed."

In *Southern Pacific Company v. Seley*, 152 U. S. 145, 154, the Court in holding that the defendant's cause of action should have been dismissed said:

"It was not pretended in the present case that the frog in which Seley had put his foot was defective or out of repair. The contention solely is that there is another form of frog, not much used, and which, if used by the defendant, might have prevented the accident."

In *Adams v. Bortz*, 279 Fed. 521 (C. C. A., 2nd Cir.), it was said:

"That a vessel is not called upon to have the best appliances is no longer a debatable question."

What is true of the ladder was true of the canvas dodger. No defect in the dodger was responsible for the plaintiff's fall. That undoubtedly was due to missing his step. Moreover, it could not have been fault upon the part of the company for the bridge officers to use the canvas dodger, even as the plaintiff claimed it was employed at the time of his accident. The purpose was proper.

Nor assuming the Railroad Employer's Liability Act to apply, was there any evidence in this case of negligence of a fellow servant. The plaintiff says that the steward told him not to use the main companionway. He admits, however, that he had been authorized by the mate, who was undoubtedly superior to the steward, to use the companionway

under the circumstances which the plaintiff claims prevailed at the time of his accident. Even if otherwise, the steward had no control over him. His own witness says that under the circumstances he would have paid no attention to the steward (fol. 222). Neither was it an act of negligence for the steward to tell him to go some other way. There were still open to him the gooseneck ladders to the rear reaching above the deck, one upon the starboard, and the other upon the port side, which the other quartermasters used. The fact that the main deck was encumbered with ropes, as he claims, was a flimsy excuse and in no sense a legal justification for his failure to have gone a better way.

The foregoing circumstances being true, it was irrelevant what transpired between him and the officer upon the bridge. He had declined to use the safer way before he appealed to the ship's officer; but if otherwise, it could not have been negligence upon the part of the officer on the bridge to authorize him to use a ladder, which was not in itself unseaworthy or out of repair, and which the plaintiff had often used before with success. As was said by Judge Hough in *Hanrahan v. Pacific Transport Co.*, 262 Fed. 951, 952, seaworthiness and safety are not to be confounded.

There would seem to be no doubt that the plaintiff assumed whatever risk there was.

POINT VI.**The Court erred in charging the jury upon the assumption of risk.**

The Court in its instruction (fol. 432) read the provision of the Railway Employees Act to the effect that in an action against the carrier, the fact that the employee may have been guilty of some negligence on his own part does not bar recovery, but that the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. He then proceeded to charge as follows (fol. 445) :

“So that if it should appear to you * * * that he (plaintiff) knew the risk of the particular ladder that he (plaintiff) did use * * * then you must apply the provisions of that law. If it appears to you * * * that these other conditions were not such defects as claimed, and were not the cause or contributing causes of his injury, then he would not be entitled to recover at all.”

It is quite evident that under this charge the jury could find that the plaintiff assumed the risk, and yet allow that fact to weigh only in diminution of the amount of the verdict. In view of this charge, defendant's counsel requested the Judge to charge the jury that the assumption of risk was an absolute defense (fol. 460), which request the Court refused. The Trial Judge having left the question of assumption of risk to the jury (fols. 447, 448), it was undoubtedly his duty to further charge that if the jury found that the plaintiff did assume the risk, they should treat that fact as an absolute defense and not by way of mitigation of damages.

In *Pryor v. Williams*, 254 U. S. 43, 45, the Supreme Court of Missouri held that if the plaintiff assumed the risk, it amounted in effect to contributory negligence, and would work only a reduction of damages, but not defeat the action. The Supreme Court of the United States on *certiorari* to the state court held, however, in view of the federal statute and the defense under it, that the state court erred. The Supreme Court further said, at page 46:

"The court was requested to instruct the jury that the effect of the assumption of risk by Williams incident to the use of the claw bar, and the circumstances under which it was used, was to relieve defendants from liability 'for the injury resulting therefrom.' The court refused the instruction as it was requested and amended it by adding thereto 'and such fact (the assumption of risk) will be considered by you in determining the amount of plaintiffs' recovery, if any, under all of the instructions.'

The refusal and modification were assigned as error and the Supreme Court considered and decided, as we have seen, that the fact was of no determining importance and, if it existed, only constituted contributory negligence and could operate only in reduction of the amount of recovery, not defeat recovery. This was error, as we have seen."

The contention of the Circuit Court of Appeals that a seaman does not assume the risk of defective appliances, nor of using a way to which he is commanded by a superior officer, have no application here. We do not think that the appliances were defective in the sense of unseaworthiness or that the plaintiff was *ordered* to use them. But assum-

ing to the contrary, plaintiff's testimony made out only a *prima facie* case in that regard. This evidence was at every point directly contradicted. As the jury were charged, they could have believed the defendant's testimony and still have found for the plaintiff upon the theory that this circumstance only reduced the verdict. If they believed the defendant's testimony, assumption of risk was an absolute defense, as we have seen, and failure to so charge was prejudicial error.

It is respectfully submitted that the case should be reversed.

RICHARD REID ROGERS,
Proctor for the Plaintiff-in-Error,
The Panama Rail Road Co.



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WM. H. STANSBURY

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 369.

PANAMA RAILROAD COMPANY,

Plaintiff-in-Error,

Against

ANDREW JOHNSON,

Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR

SILAS BLAKE AXTELL,

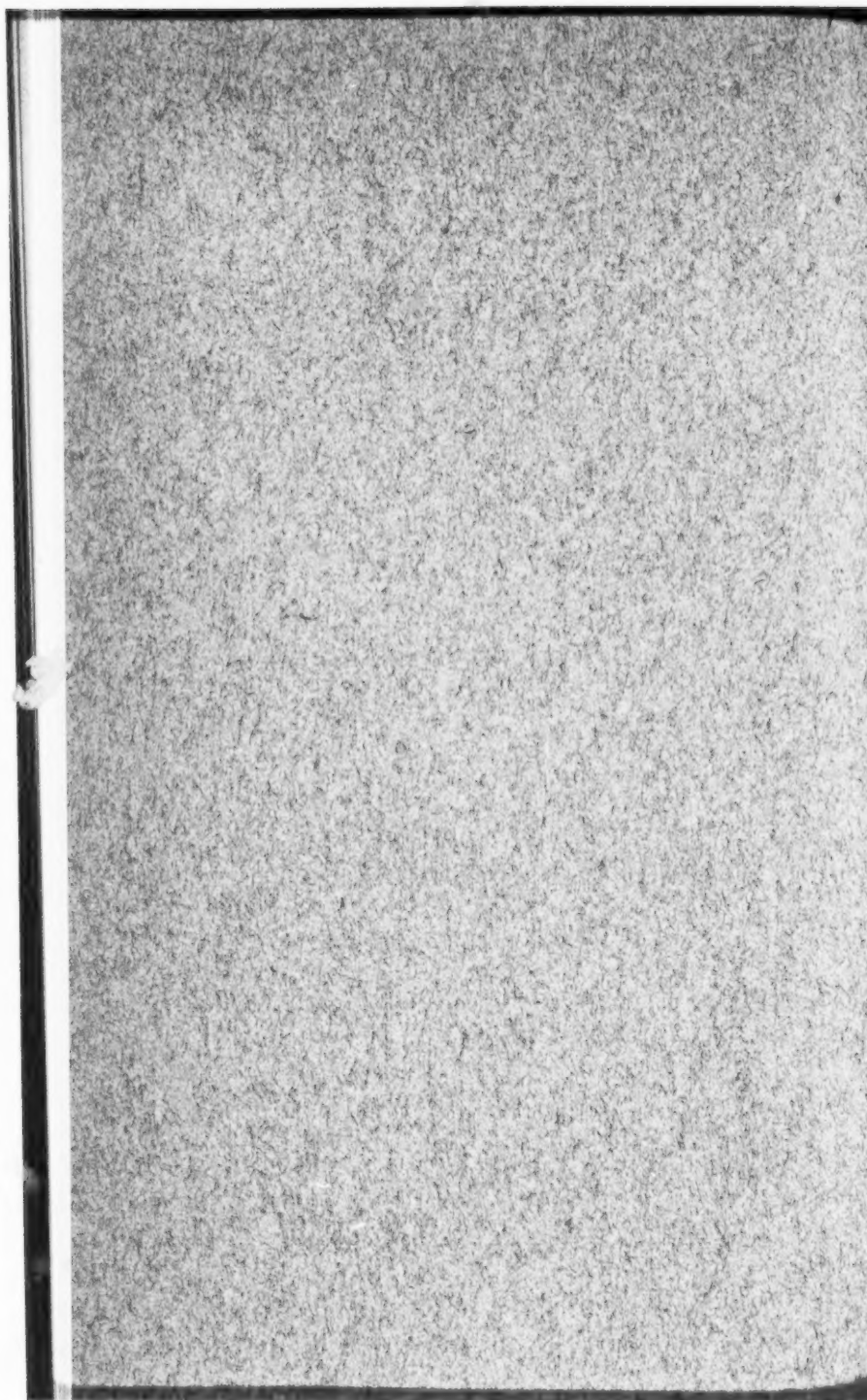
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BRIEF FOR DEFENDANT-IN-ERROR

STATEMENT

This case presents the question of the constitutionality of Section 33 of the Act of June 5, 1920, c. 250, 41 U. S. Stat. p. 1007, known as the Jones Act, amending Section 20 of the Seamen's Act.

Section 33 of the Jones Act is as follows:

"Sec. 33. That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:

'Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.' "

The question arises in the following manner:

Plaintiff below, the defendant in error here, brought an action in the United States District Court for the Eastern District of New York, for damages for personal injuries sustained by him in the course of his employment on board the "Allianca", owned and operated by the Panama Railroad Company. The plaintiff below fell while attempting to ascend, as he was directed to do, a ladder which was so constructed that it had no hand hold above the bridge rail, and it was necessary to grasp a canvas dodger for support, which dodger gave way. The plaintiff was severely injured, suffering a broken hip and was permanently disabled. The Trial Court, Judge Woodrough, submitted the case to the

jury on the theory that Section 33 of the Jones Act was valid and that the statute known as the Federal Employers' Liability Act, made applicable to such cases by Section 33 of the Jones Act, applied.

After verdict of the jury, judgment was rendered for the plaintiff below. On writ of error, the judgment was reviewed by the United States Circuit Court of Appeals for the Second Circuit (on original hearing and on rehearing) and in an elaborate opinion discussing all points made by the plaintiff in error, the Jones Act was held constitutional and the judgment of the District Court for the Eastern District of New York was affirmed. (Opinion of the Circuit Court of Appeals is set forth in the appendix to this brief.)

Plaintiff in error contends in this Court: (1) That Section 33 of the Jones Act is unconstitutional; (2) That the District Court was without jurisdiction to try the case; (3) That there was no evidence of negligence of the defendant below, and (4) That the trial court erred in charging the jury.

These contentions will be considered in their order.

ARGUMENT

I

Constitutionality of Section 33 of the Jones Act

The principal question in the case is the validity of Section 33 of the Jones Act. The plaintiff in error complains that the court below erred in not holding that Section 33 of the Jones Act (the Merchant Marine Act) passed June

5, 1920, by Congress, is unconstitutional. The act provides in substance that any seaman who suffers personal injury in the course of his employment may maintain an action for damages at law, with right of trial by jury, and makes applicable to such action by seamen the rights in cases of personal injury, given to employees of railroads in the United States by the Federal Employers' Liability Act of Congress relating to injuries of employees on interstate railroads.

Counsel for plaintiff in error criticizes this section because, as he says: (1) it makes a change in the maritime law which Congress has no power to make; (2) it is in conflict with the Fifth Amendment to the Constitution, and (3) it is vague and uncertain because it transfers by reference the laws relating to liability of railroad employees to the statutes relating to the liability of vessel owners, without specifically enacting or re-enacting the terms of the provisions incorporated by reference. These objections, he contends, are fatal to the constitutional validity of this act of Congress.

Before discussing these contentions in detail it is desired to make some general observations which will conduce to clearness in the discussion of the question as to the power of Congress over maritime law.

The maritime law of the United States is manifestly a matter of national as distinguished from state concern, and is peculiarly a subject for the exclusive action of Congress and a subject over which Congress has plenary power. If there is any limitation on this power, it must, of course, be found in some distinct and unequivocal provision of the

Constitution of the United States. There is no other or general body of law, national or international, which can limit the national lawmaking body.

The only limitation (if it be a limitation) in the Constitution which counsel for plaintiff in error suggests, is the language of Article 3, Section 2, of the Constitution. Article 3, Section 2, relates to the judicial power and to nothing else. It provides that the judicial power shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States, treaties, etc., "to all cases affecting ambassadors", and (then we come to the language counsel refers to) "to all cases of admiralty and maritime jurisdiction". It is on these words of the Constitution, "the judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction", that the whole argument rests and must rest. Because of this language in the Constitution, counsel for the plaintiff in error contends that Congress is without power to pass any law relating to seamen—a subject which is clearly of admiralty concern—which makes their rights with reference to personal injuries and the fellow-servant rule the same as fixed for railroad employees and allows them to sue in the law courts, with trial by jury.

The power of Congress to legislate with reference to maritime law is not a subject brought up now in this country for the first time. On the contrary, it is a very old subject discussed in all text books, encyclopedias and annotations, and passed upon definitely and conclusively in many decisions of the federal courts, including those of this court. It is now so well settled as to be expressed by this Court as

a matter *beyond doubt* that Congress has full power to alter, modify, correct or deal with the code of laws that we call the maritime law (so long as the subject with which Congress is dealing is a maritime subject), and nothing in the Constitution extending the judicial power to cases of "admiralty and maritime jurisdiction" limits Congress in determining that the maritime law which the courts are to administer shall be such as the needs of the nation may require.

The only hint to the contrary is a curiously strained construction and misapplication of certain sentences used in one of the early decisions of this Court. In the case of *The Lottawanna* (21 Wall. 558), Mr. Justice Bradley refers with approval to some language of Chief Justice Taney in a case in the lower federal court. This language is seized upon by counsel for the plaintiff in error as supporting his contention. It is as follows:

"The question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no State law or act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be."

All that this means, or was intended to mean, is that the question of *what is maritime law*, that is, a law relating to a maritime subject as distinguished from some other subject, is a judicial question. Manifestly the courts, and not Congress, are to interpret and define words used in the Constitution, and that is what Chief Justice Taney is saying. But this is very far from saying that Congress, legislating

on the subject as defined by the courts, may not alter and modify the body of substantive or adjective law clearly relating to that subject. To take an analogy, the courts must define what is interstate commerce, and Congress cannot itself determine what interstate commerce is, but this does not mean that the body of interstate commerce law, if any, as understood at the time of the Constitution, must remain unaltered. On the contrary, Congress has the fullest power to provide the whole code of laws for interstate commerce, both rights and remedies. All this seems so clear that it hardly requires elucidation but for the use made by counsel for the plaintiff in error of the language of Mr. Justice Bradley. But even in the very case from which the language referred to is quoted there is the clearest recognition of the plenary power of Congress, as hereinabove explained.

In the same opinion Mr. Justice Bradley says emphatically "*no one doubts*" that the United States may adopt a whole maritime code just as England or France might. The language is:

"No one doubts that every nation may adopt its own maritime code, France may adopt one, England another, the United States a third."

Further, he says:

"Congress undoubtedly" (again the strong language) "has authority under the commercial power, if no other, to introduce such changes as are likely to be needed."

He is speaking, of course, of changes in the maritime law. The language could hardly be stronger. This doctrine has long been followed in this Court. In *Chelentis*

v. Luckenbach S. S. Co. (247 U. S. 372) this Court says, referring to Article 1, Section 8, and Article 3, Section 2, of the Constitution, and quoting from *Southern Pac. Co. v. Jensen*:

"Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."

Now to take up briefly in detail the three objections of counsel for the plaintiff in error to the law:

(1) *As to the contention that the act makes a particular change in the maritime law which Congress has no power to make.*

This contention has long since been disposed of. In the same *Lottawanna case*, previously referred to, this Court cites as one of the typical instances where Congress undoubtedly has the power to legislate, that relating to "the rights and duties of seamen." This is stated in a list of many laws passed by Congress changing and modifying the maritime law, on page 577 of the opinion in *The Lottawanna case* (21 Wall. 558).

In the case of *Southern Pacific Co. v. Jensen* (244 U. S. 205), this Court held that a workman's compensation act of a state was unconstitutional in so far as it applied to vessels over which Congress would have exclusive jurisdiction, but in that very holding there is a clear recognition that Congress itself has plenary power over the subject, and legislation by Congress itself, not delegating power to the states, would be clearly within Congressional power. In

fact, in *Knickerbocker Ice Company v. Stewart* (253 U. S. 149) this Court, in emphasizing the distinction between state action and Congressional action, clearly recognizes the power of Congress. The Court says (p. 164):

"To say that because *Congress could have enacted a compensation act applicable to maritime injuries*, it could authorize the states to do so as they might desire, is false reasoning."

Reference has been made to the compensation acts because they certainly would go as far as would a law relating to the fellow servant rule or the liability of employers for injuries to servants, such as is given in Federal Employers' Liability law.

The whole subject may be summarized in the language of this Court in two cases: *Butler v. Boston Steamboat Company* (130 U. S. 527) and *In re Garnett* (141 U. S. 1). In the former case it is said, at p. 556, after referring to previous cases:

"These quotations are believed to express the general if not unanimous views of the members of this Court *for nearly twenty years past*; and they leave us in *no doubt* that whilst the general maritime law, with slight modifications, is accepted as law in this country, *it is subject to such amendments as Congress may see fit to adopt.*"

And in the latter case it is said at p. 12:

"The Act of Congress which limits the liability of ship owners was passed in amendment of the maritime law of the country and the power to make such amendments *is co-extensive with that law.* It is not confined

to the boundaries or class of subjects which limit and characterize the power to regulate commerce, but in maritime matters *it extends to all matters and places to which the maritime law extends.*"

A further criticism of the law, by plaintiff in error, is that it permits suits to be brought in United States District Courts on the common law side with trial by jury. But this precise question is surely covered by the broad, clear and emphatic language of this Court in the early case of *The Genesee Chief* (12 Howard 443). At page 459, the Court, referring to the grant of judicial power in the Constitution, says:

"The grant defines the subjects to which the jurisdiction may be extended by Congress. But the *extent of the power as well as the mode of proceeding* in which that jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, are subject to the regulation of Congress, except where that power is limited by the terms of the Constitution, or by necessary implication from its language. In admiralty and maritime cases *there is no such limitation* as to the mode of proceeding, and Congress may therefore in cases of that description, give either party right of trial by jury, or modify the practice of the court in any other respect that it deems more conducive to the administration of justice. And in the proceedings under the Act of 1845, the right to a trial by jury is undoubtedly secured to either party if he thinks proper to demand it."

It is a misconception of the constitutional provision (Section 2, Article 3) to say that it has in any way, or to any extent, designated the *courts* which have jurisdiction of

particular cases or matters. The Section does not say that admiralty courts, or any other courts, shall have jurisdiction of any particular matter; what it does say is that the judicial power shall extend to admiralty and maritime cases. How this judicial power is to be distributed is left to Congress to determine. The Constitution has designated the power which the courts may exercise, not the courts which may exercise the power; as expressed in an early federal case (21 Fed. 334), "the Constitution as the fountain and the laws of Congress as the stream from which and through which the waters of jurisdiction flow to the court." As said in the very early case of *Stuart v. Laird* (1 Cranch. 299):

"Congress have constitutional authority to establish from time to time such inferior tribunals as they may think proper; and to transfer a cause from one such tribunal to another. In this last particular *there are no words in the Constitution* to prohibit or restrain the exercise of legislative power."

The fallacy in the argument of counsel for plaintiff in error is that he assumes that the words "cases of admiralty and maritime jurisdiction" designate not only the subject matter of the causes, but the courts in which they shall be tried. This argument has long since been answered by the decisions of the courts. The only court designated anywhere in the Constitution is the Supreme Court of the United States. The establishment of inferior courts and the distribution of all grants of judicial power among such courts is left entirely to Congress.

(2) *The Act is not in conflict with the Fifth Amendment.*

The contention that the Jones Act is in conflict with the Fifth Amendment to the Constitution because it is class legislation may be disposed of in a few words.

In substance, the contention is that the law places employers of seamen on vessels in a disfavored class and their employees engaging in such business in a favored class, and that this constitutes arbitrary classification and is unconstitutional because it violates the Fifth Amendment. The contention is stated in several different ways. In one place it is said that a right or privilege is extended to the seaman while no corresponding right or privilege is extended to the ship owner. In another place it is said that the law discriminates against one party to a contract in favor of another party to a contract. The familiar cases of *Adair v. United States* (208 U. S. 161), *Coppage v. Kansas* (236 U. S. 1), *Adkins v. Children's Hospital* (No. 795, Supreme Court Advance Opinion 1922-1923, p. 440), and others along the same line, are cited to support the proposition.

These cases do not remotely touch the contention as to class legislation which counsel for plaintiff in error makes. Even if the distinction, which counsel entirely overlooks, between the Fifth Amendment, guaranteeing due process of law, and the Fourteenth Amendment, guaranteeing also the equal protection of the laws, be ignored, still the case presented by this law is a simple application of the doctrine of appropriate classification now rendered commonplace by a long line of decisions. (*Chicago, B. & Q. R. Co. v. Mc-*

Guire, 219 U. S. 547; *Quong Wing v. Kirkendall*, 223 U. S. 59; *Jeffrey v. Blagg*, 235 U. S. 571; *Hadacheck v. Los Angeles*, 239 U. S. 394; *Rast v. VanDeman*, 240 U. S. 342, 357; *Armour & Co. v. North Dakota*, 240 U. S. 510, 517.)

Besides, every contention now made on the point has been passed upon by this Court in the Second Employers' Liability case, *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1. In that case an argument as to class legislation was made strikingly similar to that made by plaintiff in error in the case at bar. It was urged:

"The purpose of both the 5th and 14th Amendments to the Federal Constitution is to secure the existence of fundamental justice and to prevent capricious and arbitrary legislation whereby unfair burdens are placed upon one class of persons. If such legislation be passed by any of the states, it conflicts with the 14th Amendment. If it is an Act of Congress, it conflicts with the 5th Amendment. In this respect the construction placed upon one Amendment is applicable to the other."

In the opinion, Mr. Justice VanDevanter, speaking for the Court, both states the precise question and gives the answer. At page 49, he says:

"It is objected that it (the act) * * * offends against the 5th Amendment to the Constitution * * * (b) by arbitrarily placing all employers engaged in interstate commerce by railroads in a disfavored class, and all their employees engaged in such commerce in a favored class."

At page 52, it is said:

"Coming to the question of classification, it is true that the liability which the act creates is imposed only

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on interstate carriers by railroad, although there are other interstate carriers, and is imposed for the benefit of all employees of such carriers by railroad who are employed in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains, or to hazards that differ from those to which other employees in such commerce, not within the act, are exposed. But it does not follow that this classification is violative of the 'due process of law' clause of the 5th Amendment. Even if it be assumed that that clause is equivalent to the 'equal protection of the laws' clause of the 14th Amendment, which is the most that can be claimed for it here, it does not take from Congress the power to classify, nor does it condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits the exercise of a wide discretion in classifying according to general, rather than minute, distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78. Tested by these standards, this classification is not objectionable. Like classifications of railroad carriers and employees for like purposes, when assailed under the equal protection clause, have been sustained by repeated decisions of this court. *Missouri P. R. Co. v. Mackey*, 127 U. S. 205; *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 54; *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35, 55."

(3) *As to the contention that the Section is void for uncertainty.*

The next criticism of Section 33 is that the Jones Act

is void for uncertainty because it incorporates by reference all the federal laws modifying or extending the common law right or remedy in case of personal injuries to railway employees. It is said to be uncertain because it cannot be determined how far such laws apply.

This contention is a novel one. Over and over again in the statutes of the United States, as in the statutes of the various states, laws have been enacted, upheld and applied, which incorporate by reference other laws without specifically setting them forth. "Reference Statutes" are frequent in the statute books, and are usual and approved methods of legislation in order to avoid unnecessary repetition (*Che-nango Bridge Co. v. Binghampton Bridge Co*, 3 Wall. 51, 78, 79).

Says the *Encyclopedia of the Supreme Court Reports*, Vol. 11, p. 85, summarizing the decisions of this Court on the subject: "A prior act of legislation, the common law, laws of other states, customs and usages may be incorporated into an act by general reference and need not be specifically stated." From the earliest times to the present, although such statutes have frequently been before this Court, their validity has never been questioned, whether the reference incorporating a prior law was a reference to a particular statute, or a reference to the laws on a particular subject.

Probably the earliest case on the subject is the *Binghampton Bridge Company* case (3 Wall. 51). In that case the court had before it the legislation of the State of New York which provided that the Susquehanna Bridge Company should be invested with all the powers, rights, privi-

leges, duties, regulations, etc., contained in the incorporation of the Delaware Bridge Company. The power of the legislature thus to prescribe rights, privileges, duties, etc., by reference to another law was not questioned. The Court said:

"The intention of the legislature was manifest to confer on the Susquehanna corporation all the advantages enjoyed by the Delaware company that were applicable to it, and consistent with the different locality it occupied; and the language used, in our opinion, gives effect to that intention."

Some question was raised as to whether the legislature had used language sufficiently clear to convey its intention and on that subject the Court said:

"The language, then, is: Has the legislature used language that clearly conveys that intention? And on this point we entertain no doubt."

The latest instance of such a statute before this Court is the *Baltimore and Ohio Railway v. Interstate Commerce Commission* (221 U. S. 612). In that case the Court had before it the "Hours of Service" law, Act of March 4, 1907. That act provided that certain employees should not be required to remain on duty for a longer period than nine hours "except in cases of emergency", and further provided that "all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act." It was contended that the act was void for uncertainty. The Court confined its discussion to the alleged uncertainty in the use of the words "except in cases of emer-

gency", but immediately following this discussion the Court took up the question of the power of the Commission under the reference clause of the statute, that is, the clause granting the Commission, in enforcing the provisions of the particular act, all the powers theretofore granted to the Commission, and held that the Commission undoubtedly had power to call to its aid in the enforcement of the act all the power granted to it.

There are numerous instances in which acts of Congress incorporate other laws by reference, and it is no objection to such enactments that the reference is to laws generally on a particular subject and not to a specific law. For example, in the Judicial Code the qualifications of jurors in the various districts is provided by reference to the qualifications in the various states (see 275), and it requires examination of the state laws to determine what the statute means; but it has never been contended that the law is unconstitutional because of such cross reference.

Another example is the Immunity Statute (4 Fed. Stat. Ann. 568) which has been before this Court, and which provides that "all existing laws relating to the attendance of witnesses and the production of evidence in the act to regulate commerce, and all acts amendatory thereof, shall apply, etc."

In one of the Internal Revenue Laws, long administered (4 Fed. Stat. Ann., page 176), there is incorporated all the laws covering issue, sale and so forth of stamps. In one of the Quarantine Laws (3 Fed. Stat. Ann., page 548) there is incorporated "the rules and laws governing cases of seizure of vessels for violations of revenue laws".

The precise question of validity of a law which incorporates all the laws on a particular subject has arisen in some of the states. It has *uniformly been held* that such laws are proper and are not unconstitutional, except, of course, in some states where there is a specific constitutional provision requiring that all laws shall set forth in full the provisions intended to apply. We know of no case where a law of Congress has been held void for uncertainty because it referred in general or specific terms to other laws which should apply to the subject matter of the legislation.

This very law has been upheld and applied in the highest court of New York (*Synott v. Great Lakes Towing Corp.*, 234 N. Y. 626, affirming 202 App. Div. 613).

An example of a state decision upholding a statute which incorporated other laws by general reference, is found in *Hutto v. Walker & Co.* (185 Ala. 505). In that case the Court said:

"Where a new statute specifies the procedure to be followed, but is not complete in itself, it may with perfect propriety refer to, and by reference adopt, the provisions of an existing system for the regulation of the new proceeding. And this does not require the specific adoption of the existing statutes *suis nominibus*.

"It is true that section 5887 declares 'All provisions of the election law pertaining to the contest of an election for constable shall be observed as to the contest hereunder'; and, literally construed, this would require the observance of some provisions not at all adaptable to this contest. But such a literal construction would be opposed to common sense, and would

indeed convert a clear legislative purpose into simple foolishness. The intent of the statute is to look to the constabulary system, already provided, for all of those details of procedure necessary or appropriate to an orderly contest, which are not set forth within itself. And we think that all of these necessary provisions, which are not assimilable from the older system, are in fact supplied by the statute in question. The consensus of judicial opinion on this subject is correctly stated as follows: 'A statute may adopt a part or all of another statute by a specific and descriptive reference thereto, and the effect is the same as if the statute or a part thereof adopted had been written into the adopting statute. Where, however, the adopting statute is referred to merely by words describing its general character, only those parts of it which are of a general nature, or particularly relate to the subject of the adopting statute, will be construed as incorporated into the latter, in the absence of a clear intention to adopt the whole act.'"

The real test in such an inquiry is not whether questions may be raised as to what laws apply, but whether there *is a law* to which reference *may* be made and applied. Differences of views as to the interpretation of a statute do not make the law unconstitutional.

In this connection the language of this Court in *United States v. Delaware & Hudson Co.* (213 U. S. 366) is particularly pertinent:

"It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our

plain duty to adopt that construction which will save the statute from constitutional infirmity.

"Knights Templars and M. Life Indemnity Co. v. Jarman, 187 U. S. 197, 205. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional, and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman v. Interstate Com. Comm.*, 211 U. S. 407."

In the case at bar there can be no serious question in anyone's mind that there *is a law*, answering the description of a statute "modifying or extending the common law rights or remedies in cases of personal injury to railroad employees." The well-known Employers' Liability Act is exactly such a law. Indeed, this is the one law which precisely answers the full description of the reference in section 33 of the Jones Act. Of course, it is well known that such law was intended to be incorporated by Congress and it is so obviously referred to that it is mere absurdity to suggest, because we may speculate as to the possibility of some other statutes applying, that therefore we *cannot find any law to fit the reference* and the statute is thus meaningless. And if there is a law of the kind described which does fit the reference the claim of unconstitutionality falls to the ground.

The chief if not the sole reliance of plaintiff in error in the argument as to "uncertainty" is the recent decision of this Court in the *Lever Act* Case. (*United States v. Cohen Grocery Company*, 255 U. S. 81.) But such cases as the *Lever Act* decision, holding the words in a statute void for uncertainty because *incapable of any application*, rest upon very different grounds from those construing acts containing a reference to other laws, where the only difficulty, if any, is determining the extent of the application of such other laws. In the *Cohen Grocery Company* case the Court was considering a statute which imposed a penalty for the exaction of "excessive" prices. The Court held that such a law was void because the meaning was incapable of ascertainment, as there was nothing to which reference could be made to determine what was condemned by the law.

A clear distinction was made *in that case* between the use of indeterminate and meaningless language, which would make a law void and the use of language which *could* be interpreted either from the text of the statute itself or by reference to the subject with which it dealt, which would make a law valid. This Court in the *Cohen Grocery Company* case said that the *Lever Act* merely punished acts "detrimental to the public interest," which was meaningless, whereas the acts sustained in other cases to which reference was there made "all rested upon the conclusion that for reasons found to result either from the texts of the statutes involved or the subjects with which they dealt, a standard of *some sort* was afforded." The statute in the case at bar is clearly of the latter description. No one can fairly say that a reference to laws modifying or extending the rights

of railway employees in personal injury cases is meaningless when the well-known Employers' Liability Act is on the statute books.

There is another reason why this court should not hold Section 33 of the Jones Act unconstitutional at the suit of this plaintiff in error. The rule is so well settled as not to need the citation of authorities that where the litigant is not prejudiced in the particular litigation by the provisions of the law in question he cannot contest the constitutionality of such provisions. That is the situation of the Panama Railroad Company in this particular action. It was not prejudiced by the law applied by the Court below in its instructions to the jury. As expressed by the Circuit Court of Appeals in this case (referring to the contention that the law was uncertain because it could not be determined exactly what other statutes applied):

"The answer to all this is that the Court below did not apply, and was not asked to apply, any of these acts, except certain provisions in the federal Employers' Liability Act. Whether there are provisions in any of the other acts named which were intended to be included in the Jones Act, and which make it invalid, is not before the court upon this record, and need not be considered, as neither the plaintiff nor the defendant has been affected by them in any manner in this action." (289 Fed. 964, 973.)

Under such circumstances the plaintiff in error could not be prejudiced by the possibility that some Court in some other case might apply some other statute because the language of the Jones Act might be found to be broad enough to permit such other statute to be brought in.

The language of this Court in *Arizona Copper Company v. Hamner* (250 U. S. 400, 429) is directly in point. In that case it was contended by an employer that the Arizona Employers' Liability Act was unconstitutional because it was couched in the broadest terms and made the employer liable even where the occupation was not hazardous, and that it provided for compensation not alone to dependents but to those distantly related, and even by way of escheat to the state. The Court refused to pass upon the validity of the act in that respect and said:

"To the suggestion that the act now or hereafter may be extended by construction to nonhazardous occupations, it may be replied: first that the occupation in which these actions arose were indisputably hazardous, hence plaintiffs in error have no standing to raise the question (*Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576; *Hendrick v. Maryland*, 235 U. S. 610, 621; *Middleton v. Texas Power & Light Co.*, 249 U. S. 152, 157. * * *)"

"To the objection that the benefits of the act may be extended, in the case of death claims, to those not nearly related to or dependent upon the workman, or even may go by escheat to the state, it is sufficient to say that no such question is involved in these records."

The Court in that case added "it would be improper for this Court to assume in advance" that some Court "will place such a construction upon the statute as to render it obnoxious to the Federal Constitution."

See also *Heald v. District of Columbia* (259 U. S. 114).

We are not concerned here with problems or speculations

in the interpretation of the Jones Act not before the Court. We are not required to determine whether certain safety appliance statutes, or hours of service or boiler inspection acts applicable to interstate railroads, have been extended to American vessels; nor whether automatic couplers or some particular construction of ladders on railway trains must be applied to ships at sea. It is enough to say that none of these statutes was applied, or attempted to be applied by the trial court in the case at bar. It is enough to say, as manifestly appears in the present record, that the Jones Act, in so far as it affects this case, was properly construed; that the instructions to the jury correctly stated the law, and that no question of voidability of the statute on the ground of uncertainty is before the Court. Certainly an act of Congress is not to be nullified on the mere suggestion that in some other case, on some other record between other parties, a doubt may arise as to the full extent of its application.

II

The Jurisdiction of the District Court

The action in the trial court was brought in the Eastern District of New York although the principal office of the defendant below was in the Southern District of New York. The defendant below, however, entered a general appearance and answered to the merits, submitting to the jurisdiction of the court. It is now contended by the plaintiff in error, defendant below, that it could not waive the jurisdiction.

The rule is so well settled that the jurisdiction of courts

over the persons of the parties to a suit is one of personal privilege and is waived by a general appearance without objection to the jurisdiction over the person, as not to need the citation of authorities.

This court in a very recent decision (*General Investment Co. v. Lakeshore & M. S. R. Co.*, 260 U. S. 261), speaking of Section 51 of the Judicial Code providing that suit shall be brought only in the district whereof the defendant is an inhabitant, or if the action is between citizens of different states, shall be brought in the district of the plaintiff or defendant, says:

"This restriction, as repeatedly has been held, does not affect the general jurisdiction of a district court over a particular cause, but merely establishes a personal privilege of the defendant, which he may insist on, or may waive, at his election, and does waive, where suit is brought in a district other than the one specified, if he enters an appearance without claiming his privilege. *Central Trust Co. v. McGeorge*, 151 U. S. 129; *Interior Constr. & Improv. Co. v. Gibney*, 160 U. S. 217; *Re Moore*, 209 U. S. 490, 501; *United States v. Hvoslef*, 237 U. S. 1, 12; *Camp v. Gress*, 250 U. S. 308, 311."

The only authority relied on for the surprising proposition of the plaintiff in error is a decision by a District Judge in Oregon in *Barrington v. Pacific S.S. Co.* (282 Fed. 900). The decision in the District Court in Oregon, as well as the whole subject, has been so fully considered in the opinion of the Circuit Court of Appeals in this case that it is not necessary to elaborate upon the argument and answer at length the contention of the plaintiff in error.

In the *Barrington* case, the Court seemed to think that the defendant could not submit to the jurisdiction because the statute used the language "jurisdiction in such cases *shall* be under the court of the district in which defendant resides, etc." But this same mandatory language is used in many statutes providing where actions are to be brought, and as to which it has never been doubted that a defendant may admit jurisdiction over his person by general appearance.

As said by the Circuit Court of Appeals in this proceeding (*Panama R. R. Co. v. Johnson*, 289 Fed. 964, 984), referring to the *Barrington* case:

"In reaching its conclusion the court attached much importance to the word 'shall', and thought it showed an intent to constitute the court in all such actions a court of special and not general jurisdiction. The court said: 'The mandatory language of the statute indicates as much. Mark the language: 'Jurisdiction in such actions 'shall' be under the court of the district,' etc.

"We are unable to concur in the conclusions reached in the *Oregon* case, and we are unable to see why the word 'shall', as found in the Jones Act, should have any greater significance than the Supreme Court has attached to the same word as found in section 51 of the Judicial Code."

III

As to the Contention That There Was No Evidence of Negligence of the Defendant Below.

The plaintiff in error contends that there was no evidence whatever of any negligence of the defendant which could

have been submitted to the jury—a point not argued to, or considered, or passed upon by the Circuit Court of Appeals.

The very argument in which this point is set forth indicates clearly that there must have been, at least, a conflict of evidence on the question of the negligence of the defendant. A cursory review of the record will show beyond doubt that the question of negligence of the defendant, under the law, was in contest throughout the evidence, and that there was ample evidence on both sides of the question.

The plaintiff below was quartermaster (Rec. p. 18) under articles which required obedience of all lawful commands, and that, to a seaman of his experience meant obedience to any order while on duty. He belonged to the four to eight watch (Rec. p. 18) and had been ordered by the first mate, who was in charge of that watch (Rec. p. 19) to take the soundings. To do that he had been standing on the forward deck in front of the bridge, heaving a lead weighing about 14 pounds, to which was attached 30 fathoms of line (Rec. p. 20). When he finished with this work, at about 8:10 P.M. (Rec. p. 20) he started back to the bridge to place the lead and line where they belonged in a box located there. In rough weather the seamen were accustomed to use the companionway, or steps, which were inside the vessel and leading through the passengers' quarters just outside the dining-room, to the bridge (Rec. p. 24). At the entrance to the passengers' quarters, and at the bottom of the companionway, which he was about to use in ascending the bridge, stood the chief steward, who blocked his

way and prevented his passing (Rec. p. 24). There being a conflict of authority (Rec. pp. 26, 27) between the present order of the present chief steward and the former instructions issued by the chief mate (Rec. p. 37), Johnson proceeded back on the deck to the front of the bridge where he asked the third officer, who was then in charge of the eight to twelve watch, for instructions (Rec. p. 26). He answered: "Walk up this way on this ladder." (Rec. p. 26.) Under orders then Johnson started up a permanent ladder, fastened to the front of the bridge. As shown by drawings marked in evidence, and photographs (Rec. p. 27), this ladder extended from the level of the forward well deck to a distance of about a foot *beneath* the top of the bridge rail (Exhibit 1) and had no hand rail or guard which could be grasped for support (Rec. p. 6). The *Allianca* was a vessel of about three thousand tons (Rec. p. 126). She was just leaving the Guayaquil River and heading into the open sea. There was a stiff breeze blowing, and she was pitching and "digging into it" (Rec. pp. 21, 40). "She was a small ship and she had a quick motion when pitching into the sea. She wasn't like a big ship. They take a longer motion" (Rec. p. 40). At any rate, when he got to the top of this ladder he took hold of the only thing available for support, the top of a canvas dodger, or spray cloth, which was about two and a half feet in diameter, the bottom being attached to the front of the bridge a short distance below the top of the rail (Rec. pp. 26, 27). Johnson testified, "I had my hand on the ladder cloth on the top and the other hand

on the ladder cloth, and I could not see whether the stop broke, but I know it gave way" (Rec. p. 21).

He fell to the deck below striking on top of the lead, and sustained a fracture of the right femur, which produced a substantial shortening of the limb and a permanent disability.

That one of the stoppers attached to the dodger broke, is indicated by the above when coupled with testimony of Michaelson, another member of the crew (Rec. p. 89), who stated that on the next day he found one of the stoppers of the dodger near the ladder broken; that he repaired it along with others (Rec. pp. 89, 91), which were also frayed.

This ladder on the front of the bridge is described as an emergency or fire ladder, by experts who were called (Rec. pp. 65 and 105). The usual and ordinary ladder provided on such vessels has a passage-way over the front of the bridge and is constructed differently (Rec. pp. 65, 67, 77, 79, 105, 106). Such ladders when used as a passage-way for the crew to go to and from the forward deck to the bridge, or from the bridge to the forward deck on most ships, extended up above the top of the bridge rail (Rec. pp. 68, 69, 73, 79, 80-81). And many of these ladders have a goose-neck at the top, similar to the ones on the after deck of the "Allianca" and are very similar in construction to the common fire-escape ladder provided on a tenement house to get from the roof to the fire-escape. Other members of the crew had fallen on this very ladder on the "Allianca" on previous occasions, but had not been seriously hurt (Rec. pp. 38, 87). As indicated by the photographs and draw-

ings in evidence, no other handhold or grips of any kind had been provided (Rec. p. 62).

The plaintiff in error contends that the plaintiff below was negligent, and that the defendant below was not negligent, because without consulting either officer he could have gone aft a distance of 150 ft. and climbed another ladder which had a goose-neck at the top, and then proceeded forward over the upper deck to the bridge. The testimony of plaintiff and other witnesses indicated that no orders had ever been issued for the seamen to use that way. In fact, it was not a passage-way. It would have been more dangerous for the plaintiff at night-time to have proceeded by that route (Rec. pp. 138, 139). And the crew had orders to stay away from there as Ladies' Parlor was located at that point (Rec. p. 139).

There were three elements of negligence submitted to the jury: (1) That of the chief steward in refusing to permit the plaintiff to go through the inside and safe passage-way; (2) The negligence of the third mate, who was on the bridge and in complete command, in ordering the plaintiff to use the dangerous ladder; (3) The negligence of the defendant company itself in failing either to provide a safe outside passage-way, such as is ordinarily provided on steamers (Rec. p. 79), or to provide a safe ladder on the front of the bridge itself.

These questions of fact were submitted to the jury under a proper charge, and the jury's verdict was rendered in favor of the plaintiff on all the issues of fact.

IV

The Alleged Error in the Charge to the Jury.

The injury to the plaintiff below resulted from the use by him of a defective appliance (a ladder not properly constructed) which he did use by order of the seaman in command at that point. Under such circumstances, he would be held under the maritime law not to have assumed the risk. The defendant below was, therefore, not entitled to have the case presented to the jury on the theory that the plaintiff may have assumed a risk, which under the law he could not be taken to have assumed.

Counsel for the plaintiff in error, by selecting certain sentences from the charge of the court, and putting them in juxtaposition to a summary of what the court charged in connection with the sentences selected, leaves the impression that the jury were instructed that if the plaintiff assumed the risk the jury must apportion the damages and allow the assumption of risk to weigh only in diminution of the damages.

A consideration of the entire charge shows that this impression is wholly unjustified. The selected sentences quoted in the brief for plaintiff in error from the charge of the court, are contained in a clear and correct charge on the subject of *contributory negligence* which was certainly not prejudicial to the defendant. The charge on this subject was as follows:

“So that if it should appear to you that there were these other methods of getting up on to the bridge

available to him, that he knew the risk of the particular ladder that he did use, that ordinary prudence and care required him to go to these other places or use these other means (if you find there were other means and that they were available), or if you find, as indeed you must find here on his own statement, that he ought not to have thrown as much of his weight as he did throw upon this canvas in getting over, and that that was carelessness on his part, and not made necessary by the conditions under which he was mounting the ladder, if it was some carelessness on his part, to some or any degree, or if any other matters show you that the man himself was guilty of some contributory negligence, then you must apply the provision of that law. If it appears to you that his own negligence and lack of care were the real cause of his injury, and that these other conditions were not such defects as claimed, and were not the cause or contributing causes of his injury, then he would not be entitled to recover at all."

Not only was it clear that the Court was here charging on the subject of contributory negligence only, but the charge was so designated by the Court, because it was related by the Court directly to that section of the act of Congress referring to contributory negligence.

In another part of the charge following this, and kept separate and distinct, was there the only reference to assumption of risk in an explanation of the provisions of the law on that matter.

It is perfectly evident that what the Court was saying to the jury was that if the plaintiff was guilty of contributory negligence in not using the prudence and care required of him in going up a ladder that he saw was not safe to use,

or not going another way, the jury should apply the law as the Court had explained it, that is, diminish the damages in proportion to the amount of negligence attributable to the employee. But this was not a charge on the assumption of risk at all, and there cannot fairly be read into it any direction to the jury that the fact of assumption of risk (which was not, and could not be in the case, as we have explained) should be used by the jury only in determining the amount of plaintiff's recovery, that is, should be used only to diminish the damages.

In any event, there was nothing prejudicial to the defendant below in anything said by the Court on the assumption of risk. As explained by the Circuit Court of Appeals in the decision now under review, the maritime law in force at the time imposed upon the ship owner the only risk, or kind of risk, that was or could have been involved in the case on the evidence; and the plaintiff below could not, under the law, have assumed such a risk.

The status of a seaman on board a vessel and under articles, compelled to obey orders and without ability to leave the ship, subject to severest penalties for any disobedience, has been recognized and passed upon by the courts in numerous instances. It is now too well settled to require discussion that under the maritime law the seaman does not assume the risk incidental to working with defective appliances, nor does he assume the risk of his employer's negligent acts. On this particular subject, the Circuit Court of Appeals of the Second Circuit in *Cricket v. Parry* (263 Fed. 523) held that even where the seaman shipped on a

vessel with knowledge that she had on board of her a defective appliance which he would have to use, and he was afterwards injured while using it, nevertheless he did not assume the risk. A verdict for the seaman who was injured in that case was sustained and a writ of certiorari denied by this Court (252 U. S. 580). See also *The Fullerton*, 167 Fed. 1; *The Colusa*, 248 Fed. 21; *Globe SS. Co. v. Moss*, 245 Fed. 54; *Lafourche Packet Co. v. Henderson*, 94 Fed. 871.

Respectfully submitted,

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WADE H. ELLIS,
Of Counsel.

APPENDIX

Opinion of Circuit Court of Appeals

Before Rogers, Manton, and Mayer, Circuit Judges

This cause comes here on writ of error to the United States District Court for the Eastern District of New York.

The plaintiff, a resident of the Borough of Brooklyn, City and State of New York, brought this action against the defendant, a New York corporation, which owned and operated the steamship *Allianca* upon which he was employed as quartermaster.

The action was brought to recover damages for injuries which the plaintiff suffered while in the performance of his duties on the ship while climbing up a ladder from the deck to the bridge and from which ladder he fell. He claims that his injuries were due to the defendant's negligence in furnishing a defective ladder and by reason of the unseaworthiness of the ship.

The complaint alleges as a second cause of action that defendant failed to furnish him with proper medical and surgical attendance although the same was requested and he was in urgent need thereof. It is further complained that defendant failed to place the plaintiff in a hospital in any of the ports at which the steamship touched thereby greatly aggravating his injuries.

The complaint states that there is now in full force and effect Section 20 of the Seaman's Act as amended by Section 33 of the Merchant Marine Act of June 5, 1920.

Damages in the sum of \$75,000 are demanded.

The jury returned a verdict for the plaintiff and assessed the damages at \$10,000.

ROGERS, Circuit Judge (after stating the above facts):

This action is brought on the common law side of the court to recover for injuries received by a seaman upon a vessel at sea.

The tort alleged occurred on navigable water—the Guanoquil River in Ecuador, South America. And all causes arising out of transactions occurring on navigable waters are, by the general admiralty law, within the jurisdiction of the admiralty courts whether the waters are part of the high seas, or are domestic or foreign.

The plaintiff has seen fit however not to sue in an admiralty court. In bringing it in a common law court he has proceeded under the Act of June 5, 1920, known as the Jones Act, 41 St. Pt. 1, 31 Ch. 250 p. 988. Section 33 of that Act amended Section 20 of the Act of March 4, 1915, to read as follows:

“Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.”

The constitutionality of that Act is challenged however in this case. If the Act is unconstitutional there is no authority for instituting this action at law. We must, therefore, consider the objection which has been raised. If the Act is void the court was without jurisdiction and it is not necessary to consider any of the other assignments of error upon which defendant relies.

Article III, Section 2 of the Constitution declares that the Judicial power shall extend to all cases of Admiralty and maritime jurisdiction. And it is said that in view of this provision in the fundamental law Congress is without power to substitute for the maritime law regulating the rights of seamen as known and accepted when the Constitution was adopted an entirely different and common law system governing such matters.

In 1861, in *The Steamer St. Lawrence*, 1 Black, 522, 526, Mr. Chief Justice Taney writing for the court and referring to the fact that the Constitution delegates to the Federal Government the judicial power in all cases of admiralty and maritime jurisdiction, declares that "certainly no State law can enlarge it, nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits." The court in that case, however, recognized the power of Congress to alter and change the forms and modes of proceeding in the admiralty courts in matters having no relation to the subject of Jurisdiction and to transfer the trial of seamen's causes from the admiralty to the common law courts.

The fact that the Constitution extended the judicial power of the Federal courts to the admiralty and maritime jurisdiction and that this meant the admiralty and maritime law at the time the Constitution was adopted does not preclude Congress from subsequently making alterations in the system of law thus referred to. And it has never been

understood that the rights of seamen existing under the maritime law would in all cases have to be asserted in the courts of admiralty to the exclusion of the courts of common law.

Mr. Justice Story in his *Commentaries on the Constitution* referring to the grant of admiralty jurisdiction wrote as follows:

"The reasonable interpretation would seem to be that it conferred on the national judiciary the admiralty and maritime jurisdiction, exactly according to the nature and extent and modifications in which it existed in the jurisprudence of the common law. When the jurisdiction was exclusive, it remained so; when it was concurrent, it remained so. Hence the state could have no right to create courts of admiralty as such, or to confer on their own courts the cognizance of such cases as were exclusively cognizable in admiralty courts. But the states might well retain and exercise the jurisdiction in cases of which the cognizance was formerly concurrent in the courts of common law. The latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction than cases of common law." 3 *Com. on Const.*, sec. 1006.

The fact must therefore be kept in mind that in a certain class of cases affecting the rights of seamen the courts of admiralty and the courts of common law had and still have a concurrent jurisdiction, and that that class of cases are not to be regarded as exclusively pertaining to the admiralty jurisdiction and as such to be heard in an admiralty court, and so are beyond the power of Congress to affect by its legislation.

In the *Judiciary Act of 1789*, St. vol. 1, p. 76, ch. 20, the right of the common law courts was recognized and it was provided that the Federal District Courts should have exclusive jurisdiction of all cases of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of

a common law remedy where the common law is competent to give it." And that provision has ever since remained unrepealed. Rev. St. 563, sec. 8.

The maritime law afforded two remedies. One was a proceeding in rem and the other was a proceeding in personam. Where the proceeding was in rem the jurisdiction of admiralty was exclusive; where it was in personam the courts of common law had a concurrent jurisdiction. And when a party came into the common law court with a proceeding in personam which he might have brought in the admiralty court, the cause was disposed of according to the procedure which governed that class of courts and was tried with a jury. It certainly cannot now be questioned that the Act under which the plaintiff proceeded was in any respect invalid in providing that a seaman who suffers a personal injury in the course of his employment may sue at law and have a right to a trial by jury.

But while a seaman who was injured in the service of his ship has from the beginning had a right to sue in the common law court and to have a jury trial the amount he was entitled to recover was not measured by common law standards but by those prescribed by the maritime law. By that law the vessel owner was liable to a seaman injured by the negligence of a member of the crew, whether a superior officer or not, only for his maintenance, cure and wages. *The Osceola*, 189 U. S. 158; *Chelentis v. Luckenbach Steamship Company*, 247 U. S. 372. The Jones Act, however, extends the seaman's right to recover damages for personal injuries and applies in such cases the remedy given under the statutes of the United States to railway employees.

In *The Lottawana*, 21 Wall. 558, 557, the Court, referring to the maritime law, said:

"It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain un-

alterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed."

The Congress has, for example, long since changed the rule of unlimited liability imposed upon shipowners by the maritime law, and created a limited liability. This it first did by an Act passed March 3, 1851. The matter came before the Supreme Court in *The Scotland*, 105 U. S. 24, 31, and Mr. Justice Bradley, referring to the Statute, said:

"But it is enough to say, that the rule of limited liability is now our maritime rule. It is the rule by which through the act of Congress, we have announced that we propose to administer justice in maritime cases."

Again in *Butler v. Boston and Savannah Steamship Co.*, 130 U. S. 527, the Statute limiting liability was before the court and was held applicable to cases of personal injury and death, as well as to cases of loss of or injury to property. In that case certain earlier cases in the court were commented upon, and Mr. Justice Bradley, speaking for the court, said:

"These quotations are believed to express the general, if not unanimous views of the members of this court for nearly twenty years past; and they leave us in no doubt that, whilst the general maritime law, with slight modifications, is accepted as law in this country, it is subject to such amendments as Congress may see fit to adopt. One of the modifications of the maritime law, as received here, was a rejection of the law of limited liability. We have rectified that. Congress has restored that article to our maritime code. We cannot doubt its power to do this. As the Constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction,' and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the

national legislature, and not in the state legislatures. It is true, we have held that the boundaries and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, and cannot be affected or controlled by legislation, whether state or national. Chief Justice Taney, in *The St. Lawrence*, 1 Black, 522, 526, 527; *The Lottowana*, 21 Wall. 558, 575, 576. But within these boundaries and limits the law itself is that which has always been received as maritime law in this country, with such amendments and modifications as Congress may from time to time have adopted."

In *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, the court had before it the Act of October 6, 1917, c. 97, 40 Stat. 395, which sought to amend Section 9 of the Judiciary Act of 1789, hereinbefore cited. Section 9 of the Act of 1789 granted to the United States District Courts, as we have already pointed out, exclusive jurisdiction of all causes of admiralty and maritime jurisdiction "Saving to suitors, in all cases the right of a common law remedy, where the common law is competent to give it." The Act of 1917 added to the above provision "and to claimants the rights and remedies under the Workmen's compensation law of any State." The Supreme Court held, Justice Holmes, Pitney, Brandeis and Clark dissenting, that this attempted amendment was unconstitutional as being a delegation of the legislative power of Congress to the States and as defeating the purpose of the Constitution respecting the harmony and uniformity of the maritime law. The majority opinion, however, conceded the right of Congress to alter the rules of the maritime law. Referring to the intention of the framers of the Constitution to commit direct control of the maritime jurisdiction to the Federal Government and to have a harmonious and uniform system of maritime law,

Mr. Justice McReynolds, writing for the majority of the court, said:

"Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended or changed except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the States to do so as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established—it would defeat the very purpose of the grant. See *Sudden & Christenson v. Industrial Accident Commission*, 188 Pac. Rep. 803."

The Supreme Court in *The Harrisburg*, 119 U. S. 199, where the subject was elaborately considered in an opinion written by Chief-Justice Waite, unanimously held that an action would not lie in the courts of the United States under the general maritime law to recover damages for the death of a human being on navigable waters. And see *The Albert Dumois*, 177 U. S. 240, 259. In *The Hamilton*, 207 U. S. 398, the court held, however, that in a proceeding in admiralty effect would be given to a state statute giving damages for death occurring in a collision at sea between two vessels which belonged to corporations of the State of Delaware which passed the statute. And this doctrine was adhered to and applied in *La Bourgogne*, 210 U. S. 95, which was a French vessel which sank at sea in a collision with a British vessel. It appeared that the law of France, the

Code Napoleon, gave a right of action for wrongful death. It is very evident, therefore, that it must be within the power of Congress to change the maritime law by giving a right of action in case of death upon waters within the admiralty jurisdiction of the United States.

And if the Congress, as we have seen it has, has the power to limit the liability of the ship or its owners within the admiralty and maritime jurisdiction of the United States, it must by the same process of reasoning have the right to otherwise alter or increase that liability. And we see no reason to doubt that Congress possesses the power to declare that ship owners shall be subject to the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect to their employees on shore, and that it may specifically provide that statutes applying to personal injury actions of railway employees shall apply to similar actions by seamen.

Neither can there be any serious question raised as to the right of Congress to incorporate in an Act other statutes by reference to them. Such statutes have been sustained so uniformly that the power of Congress is not now open to argument. The object of such incorporation as was said in *The Binghamton Bridge*, 3 Wall. 51, 79, is to avoid encumbering the statute-book by useless repetition and unnecessary verbiage. See *People v. Grossley*, 261 Ill. 78; *Turney v. Wilton*, 36 Ill. 385; *Garland v. Hickey*, 75 Wis. 178; *Quinlan v. Houston &c. R. Co.*, 89 Texas 356; *Spring Valley Water Works v. San Francisco*, 22 Cal. 434. In some of the State constitutions it has been provided that no act shall be passed incorporating an existing law except by inserting it therein. But the Constitution of the United States contains no such provision.

It remains to point out that certain other objections have

been raised to the validity of the Jones Act. But before referring to them we deem it necessary to call attention to certain fundamental and well es-ablished principles which it is necessary to keep in mind and by which we must be governed. It is the duty of every judicial tribunal to determine rights of persons or property which are actually involved in the particular case before it. As the Supreme Court had occasion to say in *California v. San Pablo & Tulare Railroad*, 149 U. S. 308, 314, "the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties, or counsel, whether in the case before the court, or in any other case, can enlarge the power or affect the duty of the court in this regard." See *Lord v. Veazie*, 8 How. 251; *Cleveland v. Chamberlain*, 1 Black, 419; *Kimball v. Kimball*, 174 U. S. 158; *Tyler v. Judges of Court of Registration*, 179 U. S. 405, 408. It is necessary for the plaintiff to show that the alleged unconstitutional features of the law injure him and so operate as to deprive him of rights secured to him by the Constitution. *Southern Railway Co. v. King*, 217 U. S. 524, 534; *Hatch v. Reardon*, 204 U. S. 152, 160; *Hooker v. Burr*, 194 U. S. 415; *Middleton v. Texas Power & Light Co.*, 249 U. S. 152, 156, 157. And this the defendant herein has not done.

In *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576, the Court declared it to be the well settled rule of the Court that it only hears objections to the constitutionality of laws from those who are themselves affected by the alleged unconstitutionality in the feature complained of. And see *Plymouth Coal Company v. Pennsylvania*, 232 U. S. 531, 544; *Rosenthal v. New York*, 226 U. S. 260, 271.

In the *Arizona Employers' Liability Cases*, 250 U. S.

400, the Constitutionality of the State statute was assailed on the ground that the Act made no distinction between hazardous and non-hazardous industries and was on that account invalid, but the court declared that the plaintiff-in-error had no standing to raise the question as the occupations in which the actions arose were indisputably hazardous.

And in the same case the objection was also made that the benefits of the Act could be extended in the case of death claims to those not nearly related or dependent upon the workman and might even go by escheat to the State. In reply the court declared that no such construction had been put upon the Act, and that it was sufficient to say that no such question was in the records and that it was improper for the Supreme Court to assume in advance that the State courts would place such a construction upon the statute as to render it obnoxious to the Federal Constitution.

In a recent case, *National Harness Mfgs.' Association v. Federal Trade Commission*, 268 Fed. 705, the Circuit Court of Appeals for the Sixth Circuit held that a party cannot complain of invalid sections of a statute where such sections are not invoked against him. In that case a petitioner seeking review of an order by the Federal Trade Commission requiring the petitioner to desist from certain practices was held unable to raise the question that the inquisitorial features of the Federal Trades Commission Act violated the Constitution where the Commission had not attempted to exercise against him the alleged invalid sections of the Act. The court declared that it was enough to say that the provisions assailed were not before the court.

The Jones Act is said to be unconstitutional in that it provides that "all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply." And

because it further provides in giving a right of action in case of death of any seaman as a result of personal injury that in such action "all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable." As respects the provision relating to death cases it is apparent that as this action is not brought to recover for the death of a seaman the question as to the constitutionality of that provision cannot be raised upon this record.

As respects the provision that "all Statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply," it is argued that it is a piece of hasty and ill-considered legislation and so vague and uncertain that no ship owner can tell what his duties are and no seaman can tell what his rights are. It is said that in particular cases it would be impossible for the court to determine what provisions of law are applicable and what special statute for the benefit of railway employees is the basis of the action. Then we are told that it is well settled that if a statute is doubtful and uncertain or is such as to make it difficult or impossible to comply with its provisions it will be held to be of no force and effect. It is added that the phrase "all statutes," etc., would make applicable not merely the Federal Employers' Liability Act of April 22, 1908, 35 St. 65, ch. 149, but the Safety Appliance Act of March 2, 1903, 32 St. 943, ch. 976, and the Boiler Inspection Act of February 17, 1911, 36 St. 913, ch. 103, and the Hours of Service Act of March 3, 1907, 34 St. 1415, ch. 2939. The answer to all this is that the court below did not apply and was not asked to apply any of these Acts except certain provisions in the Federal Employers' Liability Act. Whether there are provisions in any of the other Acts named which were intended to be in-

cluded in the Jones Act and which make it invalid is not before the Court upon this record and need not be considered as neither the plaintiff nor the defendant has been affected by them in any manner in this action.

It is necessary now to consider the validity of the Federal Statute which was directly involved in the case now before the court and which actually affected the rights of the parties. That we may understand in what manner the rights of the parties were actually affected a consideration of the principles of the admiralty law applicable to cases of this character prior to the enactment of the Jones Act is important. The rules of the admiralty law governing injuries to seamen were stated in *The Osceola*, 198 U. S. 158, 175, as follows :

"1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff v. Metcalf*, 107 N. Y. 211.

3. That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.

4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

It thus appears that under maritime law a seaman was not allowed to recover anything more than his maintenance and cure and his wages for injuries resulting from accident or the negligence of the master or a member of the crew. But that he might recover an indemnity for injuries due to the unseaworthiness of the ship, or resulting from a failure to supply and keep in order the proper appliances appurtenant to the ship.

The present case was tried in the court below upon the theory that by reason of the Jones Act the Federal Employers' Liability Act applied. That Act in Section 2 made a common carrier by railroad liable in damages to any person suffering injury while he is employed by such carrier, and that he might maintain an action at law with the right of trial by jury.

It was supposed that by virtue of the provision cited from the Federal Employers' Liability Act the right of the seamen to recover indemnity or damages is no longer restricted to seamen who receive injuries due to the ship's unseaworthiness or which result from a failure to supply and keep in order the ship's appliances, and that the right to sue for damages is now given to seamen who suffer injuries in the course of their employment.

The rules of the admiralty as laid down in the *Osceola* case differ in certain particulars, while they correspond in others, from the principles of the common law. And in view of the changes introduced into the maritime law by the Jones Act and the Employers' Liability Act we deem it important to refer to them inasmuch as their validity has been challenged in this action.

At common law a master was not liable for injuries personally suffered by his servant through the negligence of a fellow servant while engaged in the same common employment. In admiralty the same general rule prevailed and the

seaman was not entitled to recover in an indemnity suit if his injuries resulted from the negligence of a fellow servant. This was made very plain by Judge Addison Brown in *The City of Alexandria*, 17 Fed., 390. The same doctrine was applied in *Quebec Steamship Co. v. Merchant*, 133 U. S. 375, 378, where Justice Blatchford, writing for the court, said: "The case, therefore, falls with the well settled rule, as to which it is unnecessary to cite cases, which exempts an employer from liability for injuries to a servant caused by another servant, * * *." That this was the law is also stated in the third rule already quoted from the opinion of *The Osceola*, supra. But in suits not for indemnity but for maintenance and cure as stated in *Chelentis v. Luckenbach SS. Co.*, 247 U. S. 273, 384, the maritime law imposed upon a ship owner liability to a member of the crew injured at sea by reason of another member's negligence without regard to their relationship.

The Employers' Liability Act in Section 2 makes a common carrier by railroad liable in damages to an employee where the injury results in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. It also makes the carrier liable for an injury to the employee arising from any defect or insufficiency due to its negligence "in its cars, * * * appliances, machinery. * * * boats * * * or other equipment." 35 St. p. 65, ch. 149.

And in the Act of March 4, 1915, 38 St. p. 1164, ch 153, sec. 20, it was provided that in any suit to recover damages for any injury sustained on board the vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority. The fellow servant rule is not, however, invoked in the present action and we are not further concerned with it.

It was also a principle of the common law that one who

understands and appreciates a risk and voluntarily exposes himself to it cannot recover for an injury which results from the exposure. This doctrine of assumption of risk rests on the principle expressed in the maxim *volenti non fit injuria*. This doctrine was applied in the admiralty as in other branches of jurisprudence. It was recognized and applied in this court in *The Saratoga*, 94 Fed. 221, where, referring to the doctrine of assumption of risk, the court said "This has been held so many times that it is unnecessary to cite authorities. The principal ones will be found referred to and discussed in the exhaustive opinion of the learned district judge." The opinion thus referred to is found in 87 Fed. 349.

The Federal Employers' Liability Act did not change the rule relating to assumption of risk except that Section 4 of it provides that in actions brought against any common carrier under any of the provisions of the Act to recover damages for injuries to or the death of any of its employees such employee shall not be held to have assumed the risks of his employment in any case where the violation enacted for the safety of employees contributed to the injury or death of the employee. The Act therefore does not abolish the defense of assumption of risk but leaves the law as it was before except in cases in which the violation of a statute enacted for the safety of employees contributed to the injury or death. As in this case it is not claimed that any such statute has been violated we are not at all concerned with it.

It was, too, a rule of the common law laid down in *Butterfield v. Forrester*, 11 East 60, a leading case in English law, that one whose own negligence proximately contributes to his injury cannot recover any compensation from the defendant although the latter's primary negligence caused the injury complained of. And see *Railroad Co. v. Jones*,

95 U. S. 439. But the courts of admiralty did not allow the contributory negligence of the defendant to defeat his suit. As was said by Justice Story in *The Palmyra*, 12 Wheat. 1, 17, in the admiralty the award of damages always rests in the sound discretion of the court under all the circumstances. So that in cases of contributory negligence the admiralty court grants damages if it appears to it that to do so is in accordance with principles of equity and justice. 1 C. J. 1327.

The Employers' Liability Act changed the common law rule on the subject of contributory negligence by providing in Section 3 that in actions brought under the Act the fact that the employee may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. But while this changed the rule of the common law it adopted the rule of the admiralty courts. It, however, also provided "That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." With this last provision we are not concerned in this case for, as before remarked, it has not been claimed that any statute was violated by the shipowner. And with the first provision we are not concerned as it merely adopts the maritime rule.

Unless it was beyond the power of Congress to modify the maritime law in the particulars in which it was modified by making the Employers' Liability Act applicable to a case of this nature the Jones Act must be held valid so far as it is involved in this suit. We entertain no doubt but that it was within the authority of Congress by the Jones Act to make the Employers' Liability Act applicable to seamen

injured upon navigable waters within the maritime jurisdiction of the United States. As declared in *Southern Pacific Company v. Jensen*, 244 U. S. 205, 215, 216, and repeated in *Chelentis v. Luckenbach SS. Co.*, 247 U. S. 372, 381, Congress has paramount power to fix and determine the maritime law which shall prevail in this country. The system of maritime law as changed is still coextensive with and operating uniformly in the whole of the United States. The changes introduced into the system by making the Employers' Liability Act applicable to seamen who suffer personal injury in the course of their employment does not violate any constitutional right of the defendant and does not exceed the powers of the Congress.

This brings us to a consideration of certain errors which it is claimed were committed by the District Judge in his charge to the jury. The jury was instructed as follows:

"The law further provides in any action brought under this law to recover damages for injuries an employee shall not be held to have assumed the risks of his employment in any case where the violation by the employer of the statute enacted for the safety of employees contributed to the injury of the employee. That is to say, he assumes such ordinary risks of his job or employment as are known to him, or that he becomes familiar with, and that you conclude he must become familiar with in the ordinary course of the employment; except that he does not assume the risk that results from carelessness on the part of his superior, or for negligence, from defects or insufficiency of the appliances and equipment that are provided for carrying on his work."

And as to this, there are two assignments of error as follows:

"Fifth. The Court erred in declining to charge the jury,

if the railroad statute controlled, that if the plaintiff knew the character of the ladder and used it from time to time he assumed the risk of any accident which happened to him in using the ladder under the known conditions.

Sixth. The Court erred in declining to charge the jury, if the railroad statute controlled, that the assumption of the risk was an absolute defense."

It was claimed that the plaintiff, who met his injuries in falling from the ladder, had been employed upon the ship seventeen months and was entirely familiar with the ladder. And it is said that except where the risk is created by the violation of a statutory rule, railroad employees assume the risk under the Federal Employers' Liability Act just as they did at common law. The Supreme Court has held in a number of cases that assumption of risk is a bar to the action in a case governed by the Federal Employers' Liability Act. *Pryor v. Williams*, 254 U. S. 43; *Boldt v. Pennsylvania R. R. Co.*, 245 U. S. 441; *Erie R. R. Co. v. Purucker*, 244 U. S. 441; *Chesapeake & Ohio Ry. Co. v. Deatley*, 241 U. S. 310; *Jacobs v. Southern Ry. Co.*, 241 U. S. 229; *Seaboard Airline Railway v. Horton*, 233 U. S. 492.

We have, however, already seen that the doctrine of assumption of risk does not owe its origin to the Federal Employers' Liability Act. It existed, both at common law and in the admiralty before that Act was passed and Section 4 of the Act merely eliminated the defence of assumption of risk in the cases indicated therein.

It has been said that assumption of risk rests upon contract. *George v. St. Louis & S. F. R. Co.*, 225 Mo. 364; *Buena Vista Extract Co. v. Hickman*, 108 Va. 665; *Miller v. White Bronze Monument Co.*, 141 Iowa 701; *Diamond Block Coal Co. v. Cuthbertson*, 166 Ind. 290; *Poole v. American Linseed Co.*, 103 N. Y. Supp. 1047, 1048; *West-*

ern Furniture & Mfg. Co. v. Bloom, 76 Kans. 127; Johnson v. Mammoth Vein Coal Co., 88 Ark. 243. It is said to involve an implied agreement by the employee to assume the risk. Hall v. Northwestern R. Co., 81 S. C. 522. On the other hand it is denied that the doctrine rests upon contract or depends in any manner upon the agreement of the parties. It is said to be founded upon public policy. Denver & R. G. R. Co. v. Norgate, 141 Fed. 247, 253; Denver & R. G. R. Co. v. Gannon, 40 Col. 195; Rase v. Minneapolis, St. P. & C. R. Co., 107 Minn. 260; Osterhohn v. Boston & Montana Consol. Copper & Silver Mining Co., 40 Mont. 508.

In Norremore v. Cleveland, C. C. & St. L. Ry. Co., 96 Fed. 298, 301, Judge Taft, writing for the Circuit Court of Appeals of the Sixth Circuit, said:

"Assumption of risk is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself; but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed expressly or impliedly to assume."

In St. Louis Cordage Co. v. Miller, 126 Fed. 485, 502, Judge Sanborn, writing for the Circuit Court of Appeals of the Eighth Circuit, said:

"Assumption of risk is the voluntary contract of an ordinarily prudent servant to take the chances of the known or obvious dangers of his employment, and to relieve his master of liability therefor."

In *Jellow v. Fore River Ship Building Co.*, 201 Mass. 464, 467, the Supreme Court of Massachusetts said on this same subject:

"It should not be overlooked that, where the use of the term 'risk' and 'acceptance of the risk' are involved, the true question is, whether in incurring the particular danger in question the plaintiff accepted the risk in the sense that by continuing at his work he agreed to relieve the defendant from the possible results. The plaintiff consequently not only must be shown to have known of the risk but, by implication from his conduct, must be found to have voluntarily assumed it. *Wagner v. Boston Elevated Railway*, 188 Mass. 437, 440, 441, and cases there cited."

That the act of the servant in assuming the risk must have been voluntary and not under constraint is well established law. In *Shearman & Redfield on Negligence*, vol. 1, 6th ed. sec. 207, the law is said to be that "a risk must be voluntarily assumed, to relieve the master from liability. Risks incurred under coercion are not assumed." And in Section 211a it is said:

"As already stated, it is now held by the most conservative authorities, that a servant is not deprived of his right to recover for defects caused by his master's negligence, arising or first coming to the servant's notice, after he has entered into service, unless he assumes the risk of his own free and unconstrained will. If, therefore, he continues to incur the risk of such defects, under any kind of necessity, or coercion, he does not voluntarily assume the risk, and is not, necessarily, debarred from recovery thereby."

Richmond &c. Ry. Co. v. Norment, 84 Va. 167; *O'Malley v. South Boston Gas Light Co.*, 158 Mass. 135; *Lee v. St. Louis M. & S. E. R. Co.*, 112 Mo. App. 372; *Rase v.*

Minneapolis, St. Paul &c. R. Co., 107 Minn. 260; Montgomery v. Seaboard Air Line Ry., 73 S. C. 503; Elie v. Cowles, 82 Conn. 236. And in Labatt on Master and Servant, vol. 4, 2nd ed., sec. 1365, p. 3934, it is said:

"If a danger is not so absolute or imminent that injury must almost necessarily result from obedience to an order, and the servant obeys the order and is injured, the master will not afterwards be allowed to defend himself on the ground that the servant ought not to have obeyed the order."

In considering whether the plaintiff voluntarily assumed the risk we may consider the nature of his employment. This man was a seaman and was injured while obeying an order given him by an officer of his ship and which directed him to climb the ladder. It is the duty of seamen to remain with the ship and to act in obedience to the commands of the master. Disobedience of orders by a seaman may involve him in serious consequences and subject him to possible forfeiture of the wages previously earned and to imprisonment by the master. And if he leaves the ship without the master's consent and just cause he in like manner forfeits his wages and is liable to imprisonment. See *The City of Norwich*, 279 Fed. 687, 699.

A master of a vessel has authority to enforce discipline on his ship, and to compel the obedience of seamen and may inflict corporal punishment upon them. In 20 Am. & Eng. Ency. of Law, p. 203, it is laid down that his authority in this respect "is of a summary character, and somewhat resembles that of a parent over his children, a master over his servants or apprentices or a schoolmaster over his scholars." This power he has in order to maintain the good order and discipline of the ship. And as a means of punishment he may imprison or confine a seaman on the vessel. And the misconduct of a seaman may work a forfeiture of wages previously earned. 35 Cyc. 1224.

In cases of an aggravated character it may involve also an absolute forfeiture of his clothing and effects on board the ship. It is the duty of a seaman to remain with the ship to the expiration of his term of service and if he quits the ship without justifiable cause he also forfeits his wages already earned and his effects on board the ship.

All these circumstances must be considered in determining whether the plaintiff in obeying the order given him can be said voluntarily to have assumed the risk which was involved. We do not think it can be said that as a matter of law the risk involved, in obeying the order, was so absolute or imminent that a person of ordinary prudence similarly situated would have disobeyed it, or that the plaintiff should be held voluntarily to have assumed it. We do not think that under the circumstances the defendant can be heard to say that the plaintiff ought not to have obeyed the order or that in obeying it he voluntarily assumed the risk. As was said by the New York Court of Appeals in *Scarff v. Metcalf*, 107 N. Y. 211, 215, "The master's authority is quite despotic and sometimes roughly exercised, and the conveniences of a ship out upon the ocean are necessarily narrow and limited. That which on land would be contributory negligence the maritime law scarcely recognizes and readily excuses, (*The City of Alexandria*, 17 Fed. Rep. 390, 395), and in many ways throws its protection around the seaman."

There is, however, no necessity for basing this decision on the doctrine that the plaintiff cannot be regarded as having voluntarily assumed the risk. The maritime law imposed upon the ship owner the risk incident to the use of defective and dangerous appliances, and we see nothing in the new legislation which changes the law in this regard. The Federal Employers' Liability Act did not create the law—it simply recognizes it as it already existed and restricted it in the classes of cases embraced in Section 4 of

the Act. What the law previously was is stated by this court in *Cricket S. S. Co. v. Parry*, 263 Fed. 523, in which we held that a ship owner cannot avoid liability for injury to a seaman by a defective and dangerous appliance, on the ground that the seaman knew of the defect when he shipped. We declared in that case that if a ship owner supplied a defective and dangerous appliance when a proper one could not be obtained he did so at his own risk and not at the risk of the seaman. There are cases in the other Circuits holding the same doctrine. *The Fullerton*, 167 Fed. 1; *The Colusa*, 248 Fed. 21 (both in the 9th Cir.); *Bloge S. S. Co. v. Moss*, 245 Fed. 54 (6th Cir.); *Lafourche Packet Co. v. Henderson*, 94 Fed. 871 (5th Cir.). The law as laid down in the above cases is amply sufficient to justify the plaintiff's position that he did not assume the risk arising from the insufficient and dangerous apparatus which the ship owner furnished at its and not the plaintiff's risk.

The defendant charges error in that portion of the charge in which reference was made to a canvas or weather dodger stretched above the bridge rail and in front of the ladder and at the top of it. But what we have already said concerning the ship owner's liability for defective appliances makes it unnecessary to comment upon that portion of the charge referred to, for if the court erred its error certainly did not prejudice the defendant.

Judge Mayer authorizes the writer to say that, while he concurs in this opinion he expresses some doubt as to the constitutionality of the act in so far as it incorporates other statutes not by specific reference but by the general reference to statutes of the United States "modifying or extending the common law right or remedy in cases of personal injury to railway employees * * *."

Judgment affirmed.

On Rehearing

A decision in this case was filed in this court on February 15, 1923, and is reported in — Fed., —. At the time the case was argued in this court the jurisdictional question was not called to our attention. We therefore, *ex mero motu*, directed a re-argument upon that question, after our decision on the merits was handed down and that is the sole question now to be considered.

The plaintiff below is a seaman who sued the defendant in a common law action to recover indemnity for personal injuries suffered by him at sea upon a vessel owned by the defendant company. The action was brought under the Merchant Marine Act of June 5, 1920, otherwise known as the Jones Act. (38 St. p. 987, ch. 250). Section 33 of that Act gives to any seaman who suffers personal injury in the course of his employment the right at his election to maintain an action for damages at law with the right of trial by jury, and provides that in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply. And it further provides: "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The action was brought in the Eastern District of New York. The plaintiff alleged in his complaint that he is a resident of the Borough of Brooklyn, City and State of New York. Brooklyn is within the Eastern District of New York. But the plaintiff also alleged, although upon information and belief, that the defendant is a domestic corporation having its principal office and place of business in the Borough of Manhattan, City and State of New York. The answer did not deny the above allegation. And as the

Borough of Manhattan is in the Southern District of New York, the suit was not brought in the District of the defendant's principal place of business, and the question arises whether the action can be maintained—the record failing to disclose that the question of jurisdiction was raised by the defendant in the court below. Did the defendant waive jurisdiction by not entering a special appearance and pleading to the jurisdiction?

It is well settled law that the jurisdiction of courts over the persons of the parties to the suit is one of personal privilege and if a party appears failing to make objection to the jurisdiction over his person in limine the objection is waived. *Rhode Island v. Massachusetts*, 12 Peters 817; *Toland v. Sprague*, 12 Peters 300; *Harkness v. Hyde*, 98 U. S. 476. The failure to object at the proper time is a waiver of what is a personal privilege and is a consent to the jurisdiction. It is the rule that a general appearance confers jurisdiction in personam over the person so appearing. *Shields v. Thomas* 18 How. 253; *Kerp v. Michigan &c. R. R. Co.*, 14 Fed. Cas. No. 7727; *Pond v. Vermont Valley R. Co.*, 19 Fed. Cas. No. 11, 265; *Fife v. Bohlen*, 22 Fed. 878; 4 C. J. 1352.

Another question is presented where a court has no lawful power to act by reason of the fact that it is without jurisdiction over the subject matter of the litigation. Where a court has no jurisdiction over the subject matter it cannot be conferred by consent of parties. This want of jurisdiction of the subject matter cannot be waived by a failure to raise the objection in limine or at any particular stage of the proceedings. The want of such jurisdiction may be raised even on appeal. *In re Winn* 213 U. S. 458; *Andrews v. Andrews* 188 U. S. 14; *Creighton v. Kerr*, 20 Wall. 8. And the appellate court may itself *ex mero motu* raise the objection and dismiss the bill.

The fundamental question therefore is did the District Court have jurisdiction of the subject matter?

Section 24 of the Judicial Code, so far as it is material to the question under consideration provides as follows:

"The district courts shall have original jurisdiction as follows:

First. Of all suits of a civil nature, at common law or in equity; where the matter in controversy exceeds, exclusive of the interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States. * * *

The Section gives the district courts original jurisdiction "of all suits of a civil nature at common law or in equity" arising "under the Constitution or laws of the United States." The language of the Judiciary Act of September 24, 1789, which established the judicial courts of the United States, provided in Section 11 that the Circuit Courts should have original cognizance "of all suits of a civil nature at common law or in equity * * *." The clause "All suits of a civil nature at common law" has long been embodied in the statutes of the United States defining the jurisdiction of the federal courts. Its meaning is well established, and it is the settled doctrine that whenever any statute is passed which authorizes the commencement of a civil suit and under which a suit can be maintained at law jurisdiction cannot be defeated because the suit could not have been maintained in that form at the common law when the United States came into existence as a nation or prior to the enactment of the Statute. *United States v. Block*, 24 Fed. Cas. p. 1176, No. 14,610.

The Seventh Amendment of the Constitution declares that in suits at "common law" the right of trial by jury shall be preserved. The phrase "common law" as the Supreme Court has held gives the right to a jury trial not

merely in such suits as the common law recognized "among its old and settled proceedings" but in suits in which legal rights were to be ascertained and determined in contradistinction to those in which equitable rights alone were recognized and equitable remedies were administered or in the courts of admiralty which proceeded in part upon equitable principles. *Parsons v. Bedford*, 3 Peters 433, 446. And in *United States v. Holliday*, 3 Wall. 407, 414, 415, Mr. Justice Miller, speaking for the Supreme Court and referring to the provisions in the Judiciary Act of 1789 creating the federal courts and defining their jurisdiction, declared that it could not be supposed that "it was intended to limit the grant to such cases as were then cognizable in those courts," and held that Section 12 of that Act, defining jurisdiction, was prospective and embraced all cases the jurisdiction of which might be vested in the district courts by subsequent statutes. And see *Briesenden v. Chamberlain*, 53 Fed. 307; *Kirby v. Chicago &c. R. Co.*, 106 Fed. 551.

The Jones Act, Sec. 33, provides, as we have seen, gives to any seaman who suffers personal injury in the course of his employment, the right if he so elects to maintain an action for damages at law with the right of trial by jury. If it be assumed that he had no such right previously then the right is one arising under a law of the United States and the amount in controversy being in excess of \$3,000 and the suit being of a civil nature it would seem to be clearly within the original jurisdiction of the District Court as conferred by Section 24 of the Judicial Code, so far as the subject matter of the suit is concerned.

And when the subject matter of the action is within the jurisdiction of the court the requirement that the action be brought within a particular district may be waived. *United States v. Hvoslef*, 237 U. S. 1; *Thames and Mersey Mar-*

ine Insurance Co. v. United States, 237 U. S. 19; Interior Construction Co. v. Gibney, 160 U. S. 217. Where a suit arises under the constitution or laws of the United States and the requisite amount is involved it comes within the general jurisdiction of the District Courts, and where the case as thus explained is within the general jurisdiction of the court the restriction that no civil suit shall be brought in any district against any person in any other district than &c. merely establishes a personal privilege which the defendant may waive. General Investment Company v. Lake Shore and Michigan Southern Railway Co., decided by the Supreme Court on November 27, 1922, and not yet reported. Lee v. Chesapeake & Ohio Railway Co., decided by the Supreme Court on January 22, 1923, and not yet reported, which expressly over-rules Ex parte Wisner, 203 U. S. 449. These cases construe Section 55 of the Judicial Code which provides, subject to exceptions not material here, that "* * * no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." And in the General Investment Company case the court, in passing upon the above section, said: "This restriction, as repeatedly has been held, does not affect the general jurisdiction of a District Court over a particular cause, but merely establishes a personal privilege of the defendant, which he may insist on, or may waive, at his election, and does waive, where suit is brought in a district other than the one specified, if he enters an appearance without claiming his privilege.

We therefore conclude that the provision in the Jones Act which states that "jurisdiction in such action shall be

under the court of the district in which the defendant employer resides, or in which his principal office is located" relates not to the jurisdiction over the subject matter of the action but to the jurisdiction over the person and that the provision must be understood as merely establishing a personal privilege which the defendant may insist on, or may waive at his election, and does waive, where suit is brought in a district other than the one specified, if he enters an appearance without claiming his privilege.

In *In re Moore* 209 U. S. 490 it was held that where there was a diversity of citizenship which gave jurisdiction to some Circuit Court, the objection that there was no jurisdiction in a particular district might be waived by appearing and pleading to the merits. Where, however, upon the face of the record no court of the United States had jurisdiction of the controversy, originally or by removal, the consent of the parties cannot confer jurisdiction. In *re Winn*, 213 U. S. 458, 469; *Louisville & Nashville R. R. Co. v. Mottley*, 211 U. S. 149.

In *Leon v. United States Shipping Board*, 286 Fed. 681, Judge Mayor sitting in the Southern District of New York held that under the Jones Act the action had to be brought in the District where the employer resides or has his principal place of business. But the defendant in that case appeared specially and moved that the action be dismissed on the ground of lack of jurisdiction. In other words the defendant in that case elected to insist upon its privilege, and did not consent to waive it by appearing generally and failing to object. That case is plainly distinguishable from the case now before the Court.

In *Barrington v. Pacific S. S. Co.*, 282 Fed. 900 the provision in the Jones Act was construed differently in the District Court of the State of Oregon. In that case it was decided that no other court has jurisdiction of a suit brought

under the Act except the court of the district in which the defendant resided or in which his principal office is located. And in reaching its conclusion the court attached much importance to the word shall and thought it showed an intent to constitute the court in all such actions a court of special and not general jurisdiction. The court said: "The mandatory language of the Statute indicates as much. Mark the language: 'Jurisdiction in such actions shall be under the court of the district,' &c." We are unable to concur in the conclusion reached in the Oregon case, and we are unable to see why the word "shall" as found in the Jones Act should have any greater significance than the Supreme Court has attached to the same word as found in Section 51 of the Judicial Code.

We think that the District Court for the Eastern District of New York had jurisdiction of this action although it was not brought in the District in which the defendant resides or in which its principal office is located, the defendant having waived its privilege of requiring the suit to be brought in the District of its residence by not having appeared specially and objected to the jurisdiction. We see no reason, therefore, why the opinion of this court previously rendered, affirming the judgment below, should be set aside.